

71872

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

CHIEF JUSTICE

No. 1000

LEWIS AND CLARK LIMITED, PETITIONER

MARY H. LEBER, ANSWER

THE COURT, upon the petition of the petitioner, do hereby

(21,723.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 247.

LEWERS AND COOKE, LIMITED, APPELLANT,

vs.

MARY H. ATCHERLY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF
HAWAII.

INDEX.

	Original.	Print
Petition of Lewers & Cooke, Limited, to register and confirm their title to land.....	1	1
Answer of Mary Atcherley.....	5	3
Demurrer and replication of Lewers & Cooke, Limited, to the answer of Mary H. Atcherley.....	9	5
Decision of Judge P. L. Weaver of the court of land registration, September 16, 1907.....	10	6
Decree of the court of land registration, September 16, 1907.....	18	11
Notice of appeal of Mary Atcherley to supreme court of Hawaii..	20	12
Opinion of the supreme court of Hawaii, March 5, 1908.....	25	15
Petition of Lewers & Cooke, Limited, for rehearing in the supreme court of Hawaii.....	42	26
Opinion of the supreme court of Hawaii on the petition for rehearing, March 22, 1908	68	43
Decree of the court of land registration, May 22, 1908.....	74	47
Notice of appeal of Lewers & Cooke, Limited, to the supreme court of Hawaii	75	47
Statement of facts by Judge P. L. Weaver of the court of land registration.....	80	50

	Original.	Print.
Appendix A—Award and royal patent No. 1602.....	94	57
B—Record, Kalakaua <i>vs.</i> Kinimaka.....	99	59
Complaint.....	99	59
Order for process.....	102	61
Summons and service.....	103	61
Suggestion of death, &c.....	104	62
Appendix C—Record, estate of Kaniu.....	106	63
Proceedings, April 24, 1858.....	106	63
Decision of Judge Robertson.....	107	63
Letters testamentary.....	108	63
Opinion of Judge Robertson.....	109	64
Testimony of M. Kekuanaoa.....	115	67
Nauhele.....	115	67
M. Kekuanaoa.....	117	68
Kanaiana.....	118	69
Nauhele.....	120	70
Kahina.....	121	71
Citation and service.....	123	71
Petition of David Kalakaua.....	124	72
Order appointing guardian <i>ad litem</i>	126	73
Appendix D—Record, Pai and Richard Armstrong, guardians, &c., <i>vs.</i> David Kalakaua.....	127	73
Complaint.....	127	73
Letters testamentary.....	131	75
Judgment.....	132	76
Summons and service.....	133	76
Answer.....	135	77
Proceedings, August 18, 1858.....	138	79
Testimony of C. Kanaina.....	139	79
J. H. Smith.....	140	80
Puniwai.....	142	81
Kahina.....	142	82
Discontinuance.....	145	83
Decree.....	146	84
Appendix E—Record, Kapiolani Estate <i>vs.</i> Atcherley.....	147	84
Amended bill.....	147	84
Exhibit Q—Royal patent.....	160	91
R—Evidence, &c.....	167	96
S—Evidence, &c.....	171	98
Appendix F—Opinion in Kapiolani Estate <i>vs.</i> Atcherley.....	177	102
Opinion of Perry, J.....	177	103
Concurring opinion of Frear, C. J.....	189	111
Dissenting opinion of Galbraith, J.....	192	112
Judge's certificate to statement of facts.....	197	115
Opinion of the supreme court of Hawaii on motion by Mary H. Atcherley to dismiss the appeal of Lewers & Cooke, Ltd., Jan- uary 28, 1909.....	199	116
Decree of the supreme court of Hawaii, March 24, 1909.....	202	118
Original appeal by Lewers & Cooke, Ltd., to the Supreme Court of the United States and order allowing the appeal; annexed thereto, is the original acknowledgment of service of appeal and of cita- tion on appeal.....	203	119
Bond on appeal.....	206	120

INDEX.

III

	Original.	Print
Assignment of errors.....	208	121
Original citation on appeal.....	214	124
Original findings of fact by the supreme court of Hawaii, May 10, 1909.....	216	125
Appendix A—Award and patent.....	226	131
B—Record, Kalakaua <i>vs.</i> Kinimaka.....	232	135
C—Record, Estate of Kaniu.....	239	139
D—Record, Armstrong <i>vs.</i> Kalakaua.....	260	149
E—Record, Kapiolani Estate <i>vs.</i> Atcherley.....	279	160
F—Opinion in Kapiolani Estate <i>vs.</i> Atcherley.....	311	183
Judge's certificate to finding of facts.....	333	195
Clerk's certificate to transcript of record.....	335	196



1 TERRITORY OF HAWAII:

(Stamp One Dollar.)

(Stamp One Dollar.)

To the Honorable P. L. Weaver, Judge of the Court of Land Registration:

We the undersigned, hereby apply to have the land hereinafter described brought under the operation and provisions of Chapter 151, Revised Laws of Hawaii, and to have our title therein registered and confirmed and we declare

(1.) That Lewers & Cooke, Limited, a Hawaiian Corporation, is the owner in fee simple of a certain parcel of land with the buildings thereon, situate in Honolulu, Island of Oahu, in the County of Oahu and the Territory of Hawaii, and particularly described as follows:

Beginning at the South corner of Queen and Punchbowl Streets, said corner bearing by true azimuth, 2 deg. 45 min. 28 8/10 feet from the center of a sewer manhole and being South 2946 9/10 feet and West 3634 6/10 feet from the Punchbowl Triangulation Station, and running by true azimuths, (1) 321 deg. 32' 94.45 feet, along Queen Street,

(2.) 56 deg. 46' 158.4 feet, along L. C. A. No. 729;

(3.) 323 deg. 10' 151.5 feet, across L. C. A. No. 729;

(4.) 53 deg. 57' 162.37 feet, along L. C. A. 735;

(5.) 51 deg. 18' 104.7 feet, along same, and L. C. A. 677;

(6.) 317 deg. 5' 48.9 feet along L. C. A. 677;

(7.) 46 deg. 20' 53.7 feet along Mahele award 61 to Namakeha,

(8.) 140 deg. 30' 521.3 feet along Halekauwila Street.

(9.) 257 deg. 58' 545.3 feet along Punchbowl Street to the initial point. Containing an *acres* of 148,362 square feet or 3.406 acres.

Being portions of L. C. A. 129 to Kinimaka L. C. A. 729 to Kekuhaupio, and land described in a deed from Minister of Interior to Estate of B. P. Bishop, dated July 8, 1899, and recorded in book 195, page 267.

2 (2.) That said land at the last assessment for taxation, was assessed at \$25,600 and the buildings or improvements at \$10,000, total assessment \$35,600.

(3.) That I do not know of any mortgage or encumbrance affecting said land, or that any other person has any estate or interest therein, legal or equitable, in possession, remainder, reversion, or expectancy, other than as follows:

That the Kapiolani Maternity Home of the Hooulu and Lahui Society by Abigail K. Kawananakoa, its president, claim a lien in the land conveyed to applicant by the Kapiolani Estate, Limited, by reason of an instrument made by Kapiolani and recorded in the office of the Registrar of Conveyances in book 193, page 251, whereby the said Kapiolani agreed to pay to the said Home \$10,000. The applicant says that said agreement conveys no interest in said land, and disputes and denies said alleged interest.

Endorsement: Amended Oct. 11/06 as follows: A mortgage and note secured thereby in the sum of \$25,000 made and executed by Lewers & Cooke, Limited, to the trustees of Oahu College, dated July 8, 1905, recorded Liber 275, fol. 14. (Signed) W. L. Howard, Reg.

(4.) That we obtained title by deed from Kapiolani Estate Limited, dated May 29, 1905, and recorded in the office of the Registrar of Conveyances of Honolulu, book 272, page 85, and deed of correction book 272, page 277, and by deed from Carlos A. Long, Trustee, dated May 29, 1905, recorded in book 269, page 231, and by deed from the Trustee under the Will of B. P. Bishop, dated 16th Dec. 1905, recorded in book 277, page 248.

(5.) That said land is now occupied by Lewers & Cooke, Limited, as a warehouse and lumber yard.

(6.) That the names in full and addresses so far as known to us of the occupants of all lands adjoining said land, are as follows: Queen Street, Territory of Hawaii, Halekauwila Street same, Punch-bowl Street same, east side adjoining Queen Street, Lewers & Cooke, Ltd., under lease from H. Holt, and east corner mauka Ed. K. Lilikalani, residence 415 South Queen St. on premises, L. C. A. 735 by Honolulu Brewing & Malting Co., Ltd., A. Hocking, President, addressed on premises L. C. A. 677 by Kaha, Kahulani tenant at will of W. W. Ahana, addressed on the premises R. P. 7429 adjoining Halekauwile St., Kikino (w) residing on premises.

(7.) That the names in full and addresses so far as known to us of the owners of all lands adjoining said land are as follows: R. P. 7429 Halekauwile St., Kikino (w) residing on the premises.

Owners of streets Territory of Hawaii.

Lilikalani, place owned by him and Hana Lilikalani, his wife.

Brewery place owned by them and lot makai by W. W. Ahana res. 246 Kukui St.

The Holt lot leased is owned as follows: as tenants in common, John D. Holt, Fort near School St. Hon.; Ed. S. Holt, Police Dep. Hon.; Geo. H. Holt, Asylum Road near King St.; Annie K. Kentwell, care of L. K. Kentwell, McIntyre Block, Hon.; Eliz. K. Richardson, Hon.; Owen J. Holt, Hon.; R. W. Holt, Waialua; and Chris J. Holt, Waianae, Oahu, and the following minor children of Helen Holt, guardian, Vallentine O. Holt, Wattie E. Holt, Amelia A. Holt, James R. Holt, Helene A. Holt, and Irene Holt, address Honolulu, care of Helen Holt, guardian.

That the applicant was incorporated under the Laws of the Territory of Hawaii on the 1st day of Jan. 1901.

(11.) That our full name, residence, and post-office address is as follows: Lewers & Cooke, Limited, S. King St., Honolulu.

Dated, this twenty-ninth day of Jan. in the year nineteen hundred and six.

(Signed)

(Signed)

LEWERS & COOKE, LIMITED,
By O. C. SWAIN, *Secretary*.

TERRITORY OF HAWAII, ss:

JAN. 29TH, 1906.

Then personally appeared the above named O. C. Swain, Secretary of Lewers & Cooke, Ltd., known to me to be the signer of the foregoing petition and made oath that the statements therein made, so far as made of his own knowledge, are true, and so far as made upon information and belief, that he believes them to be true.

Before me

(Signed)

W. L. HOWARD,
Registrar Court of Land Registration.

Endorsement: No. 76. Petition for Registration of land. Dated Jan. 29th, 1906. For Petitioner, Castle & Withington, Honolulu. Filed Jan. 29th, 1906, 11 o'clock ten min. a. m. (Signed) W. L. Howard, Registrar.

In the Court of Land Registration, Territory of Hawaii.

Title No. 76.

In the Matter of the Application of LEWERS & COOKE, LIMITED, for a Registered Title.

Answer of Mary H. Atcherley.

Mary H. Atcherley in answer to the petition of Lewers and Cooke, Limited, says:

1.

That she denies that said Lewers & Cooke, Limited, has title to any land described in Apana 1 of Land Commission Award 129, Royal Patent 1602, to Kinimaka.

2.

That she, the said Mary H. Atcherley, has title in fee simple to the land described in Apana 1 of Land Commission Award 129, Royal Patent 1602.

3.

That her chain of title is as follows:

July 14, 1848, one Kinimaka made a claim for said land before the Board of Commissioners for quieting land titles on the ground that he had been given the land by Liliha, Governess of the Island of Oahu, years before and had occupied it ever since.

April 10, 1849, the Board of Commissioners to quiet land titles awarded this land to said Kinimaka by Land Commission Award 129.

That said Kinimaka paid the Government commutation \$82.50 and a Royal Patent was issued to him Aug. 30, 1858, No. 1602 for said land.

That said Kinimaka died in 1857.

6 That by will of Kinimaka admitted to probate Feb. 25, 1857, (Probate No. —) all this property was devised to his daughter, Kaniu Kinimaka for her lifetime, then to his son, David Leleo Kinimaka for his lifetime, and the remainder was devised to his son, Moses Kapaakea, who conveyed to defendant, Mary H. Atcherley, all of his estate in said land by deed dated May 18, 1897, and recorded in the office of the Registrar of Conveyances in Honolulu in Book 167 at page 368.

4.

That Kapiolani Estate Limited through whom petitioner claims has in sworn pleadings in the Circuit Court of the First Circuit at Chambers, admitted that respondent has a good legal title to said land.

5.

That respondent believes that petitioner claims an equitable title to said land and a right to compel a conveyance from this respondent based on various mesne conveyances from one David Kalakaua and proceedings in the Supreme Court of the Hawaiian Islands upon a petition of said David Kalakaua filed July 19, 1858, against Richard Armstrong, guardian of the minor children of said Kinimaka and Pai, with the Honorable E. H. Allen, Chief Justice of the Supreme Court of the Kingdom of Hawaii sitting at Chambers.

6.

That respondent denies that petitioner has any equitable interest in said land and any right to a conveyance from her and states that she is not bound or affected in any way by any proceedings taken on said petition of David Kalakaua on the following grounds:

1. The Supreme Court of the Kingdom of Hawaii and the Honorable E. H. Allen, Chief Justice of the Supreme Court of the Kingdom of Hawaii, sitting at Chambers, had no jurisdiction over the subject matter of said petition as the Board of Commissioners to quiet land titles had exclusive and final jurisdiction over all rights to land arising prior to the creation of the Board and said petitioner, David Kalakaua, was founded on a claim by him that said Kinimaka was not entitled to the award of said land at the time it was awarded to him by said Board of Commissioners to quiet land titles.

2. The Supreme Court and the Honorable E. H. Allen, Chief Justice of the Supreme Court of the Kingdom of Hawaii, sitting at Chambers, had no jurisdiction over the person of Moses Kapaakea Kinimaka in said action for the reason that he was not named in said action as a party thereto, and was not served with summons and entered no appearance.

4. No decree was rendered in said action against said Moses Kapaakea Kinimaka.

5. No decree was rendered in said action.

6. Any decree in said action is and would have been erroneous and should not be enforced against this defendant for in his said petition said David Kalakaua did not offer to pay the Government

commutation that had been paid by said Kinimaka, or the costs of the proceedings before the Board of Commissioners to quiet land titles.

As defendant is informed and believes the allegations of said petition of David Kalakaua as to the ownership of the land before the award of Kinimaka are not true. The statements as to fraudulent action of said Kinimaka are not true. The said statements were not proved in that case and the evidence taken in that matter does not authorize or support any decree against Moses Kapaakea Kinimaka.

7.

Laches by David Kalakaua and all his successors in his claims, including the petitioner herein, have been such as to deprive them of any right to relief in equity.

And this defendant prays that the petition of Lewers & Cooke, Limited, be denied as to the land covered by Apana 1 of Land Commission Award 129, Royal Patent 1602, and that a registered title thereto be granted instead to this defendant, Mary H. Atcherley, and that petitioner be ordered to pay all costs of this proceeding.

(Signed)

MARY H. ATCHERLEY.

TERRITORY OF HAWAII,

Island of Oahu, ss:

Mary H. Atcherley being first duly sworn before me on oath, stated that the facts stated in the foregoing answer are true except those stated on information and belief and that she believes said facts stated to be true.

This fourth day of December A. D. 1906.

(Signed)

LYLE A. DICKEY,
Notary Public, Territory of Hawaii.

Endorsed: Filed Nov. 10, 1906. (Signed) W. L. Howard,
Registrar.

9

Copy.

In the Court of Land Registration, Territory of Hawaii.

Petition No. 76.

In the Matter of the Application of LEWERS & COOKE, LIMITED,
to Register and Confirm Their Title to Certain Land.

Demurrer and Replication of Petitioner to the Answer of Mary H. Atcherley.

Now comes the Petitioner and demurs to the answer of Mary H. Atcherley, and for cause of demurrer assigns:

That the said answer does not state facts sufficient to show that the said Mary H. Atcherley has any interest in the premises set

forth in the petition, or that she has any right to object to the said application of the petitioner.

And further by way of replication, the petitioner joins issue with the respondent on each and every allegation contained in paragraphs 1, 2, 4, 6, & 7 of said answer, and also joins issues on so much of paragraph 3 as alleges that the property passed by devise to the children of Kinimaka, or by conveyance to the defendant, Mary H. Atcherley; also to so much of paragraph 5 as recites that the petition of David Kawananakao was against Richard Armstrong, guardian of the minor children of said Kinimaka and Pai and the said petition being against Kinimaka in his lifetime and continued after his death against his children and Armstrong as their guardian.

Dated, Honolulu, September 5th, A. D. 1907.

(Signed) LEWERS & COOKE, LIMITED,
By CASTLE & WITHERTON,
Their Attorney.

10 Court of Land Registration, Territory of Hawaii.

No. 76.

LEWERS AND COOKE, LIMITED, Petitioner.

Decision.

The above entitle- cause having come to issue and the hearing being set for September 9th, 1907, and a default having been granted as to all parties not appearing at the return day named in the summons and the petitioner having been taken as confessed as to them and it appearing that due notice to all parties has been given as required by law, and evidence oral and documentary having been taken and the court being fully advised in the matter finds as follows:

As to the Territory of Hawaii claiming title to a triangular piece of land in front of the corner of the warehouse building on Punchbowl street the location and size of the same being shown on the map on file with the petition, I find that the petitioner is the owner of the fee simple title therein and that the Territory of Hawaii is entitled to use the triangular piece of land at the corner of Punchbowl and Queen streets as a highway for the use of the same as a sidewalk for foot passengers, and therefore that the said strip or piece is subject to a public easement for the use of the same as a side-walk.

As to the claim of the Hoola and Hooula Lahui Society that a certain agreement dated Feb. 10, 1898 and recorded in the office of the Registrar of Conveyances in Book 193, at page 251 between David Kawananakoa and Jonah Kalaniana'ole with Kapiolani created a lien upon all the premises conveyed by Kapiolani to said David and Jonah among other lots that part of the lot described in the petition included within the bounds of apana 1 of L. C. A. 129.

11 issued to Kinimaka, and that said lien shall subsist until the payment of the sum of \$10,000 in monthly installments of \$100, the matter has been submitted on the pleadings, and I

find that there is due and unpaid upon the said agreement the sum of Five Thousand Seven Hundred Dollars.

The language of the covenant in the agreement is as follows: "It is further agreed that this sum shall be considered a debt of Kapiolani to be paid from all the property conveyed by her to the parties of the first part; and both parties agree that this arrangement shall be strictly carried out."

The general law of the case is found stated in 11 Cyc. 1092 "A lien or charge may be fixed upon land by a covenant following it into the hands of subsequent purchasers" as in this case Lewers & Cooke, Limited.

"But in order that a covenant creating a charge or lien on land may run with the land, it must be contained in a grant thereof or of some estate therein, and relate directly thereto and where no limitation has been put to the absolute and unqualified ownership of the grantee, and there is no condition charge or lien, a covenant of the grantee contained in the conveyance is a personal covenant, and does not run with the land."

The property conveyed by Kapiolani to David and Jonah was personal and real and the matter is agreed to be a debt payable from all the property. This is an agreement made separate from the deed and there is no recording of this agreement until July 8, 1899. It is not shown that this agreement was delivered with the deed to which it refers. The agreement whether a lien or not does not fulfil the condition of being in a grant of the land, or relate directly thereto. In the deed from Kapiolani to David and Jonah of the same date, Feb. 10, 1898, there is no condition, charge or lien and there is no limitation put to the absolute and unqualified ownership of the grantee.

12 I am of the opinion that the agreement above described is a personal covenant and does not run with the land. I therefore find for the petitioner and against the claims of the Society, and decide that they have no interest in the land described.

As to the claim of W. W. Ahana that he has an easement for a right of way for going and coming over a portion of the land along and near the course 7 on the map from his lot to Halekauwila street, I find that he has not acquired any easement over said land and decide that there is no easement over the same. There was no easement there in ancient times and said Ahana has not acquired one by prescription since. The land of petitioner is free of any such easement.

There remains to decide the main controversy as to the ownership of that portion of petitioner's claim included within the boundaries of land described in L. C. A. No. 129, apana 1 awarded to Kinimaka.

The facts are shown in the Examiner's report as elaborated by the exhibits of the original papers in Equity No. 155, David Kala-kaua v. Pai and Richard Armstrong, Guardian, Equity No. 1246 Kapiolani Estate, Limited v. Mary H. Atcherly Probate No. 1770, Estate of Lilia H. Kaniu and by the oral testimony of witnesses as to the actual possession of the land in dispute.

There is now pending an equity case involving the same controversy as to the effect of the decree of a court of equity in 1858, but the contestant having come into this court and submitted herself to my jurisdiction I take jurisdiction of it by her express consent, and without any dispute as to my right to do so by any party.

The facts of the case are quite lengthy in detail and may be summarized as follows:

13 The contestant Mary H. Atcherly, claims as a privy in title with the original grantee Kinimaka. The petitioner claims title as in privy of title with Kalakaua a ward of Kinimaka whom it is claimed was the real owner of the title, defrauded by Kinimaka in 1849, and declared to have so defrauded him by a court of equity in 1858.

A detailed statement of the case may be found in Kapiolani Estate Limited vs. Atcherly, 14 Haw. 651.

A few details in addition to the statement there set forth may elucidate the contentions of parties.

The testimony before the Commissioners to Quiet Title to Land shows that Kinimaka claimed that he got the land in controversy from some one other than Kaniu, his deceased wife and that the commission awarded him the title on such evidence.

The premises in controversy comprise over two acres with improvements and are worth more than five thousand dollars.

After the decree against Armstrong as guardian of the Kinimaka minors and in favor of Kalakaua, and within the same year Armstrong loaned to Kalakaua \$450 upon the security of a mortgage from Kalakaua of the premises in controversy.

The premises were likewise mortgaged by Kalakaua to a stranger to the controversy in 1868, and later in the same year the premises were conveyed to Kapiolani wife of Kalakaua who conveyed the premises to David Kawananakoa and Jonah Kalanianakole who in turn caused the premises to be conveyed to a corporation the Kapiolani Estate Limited. This corporation conveyed to the petitioners herein.

The evidence produced before me proves that Kapiolani and Kalakaua occupied the premises as a home from about 1870 until Kalakaua died in 1890, and thereafter the place was occupied by Kapiolani as her home until she died and since her death by her grantees and their assigns, claiming title.

The only evidence as to who was in possession of the premises prior to that time is found in the evidence produced in the equity case which shows that Kalakaua was living there prior to 1843

14 with his adopted mother Kaniu, and after her death in 1843 he was living there as her heir claiming as heir of Kaniu, by virtue of an oral will admitted to probate, May 3, 1858. (See Probat- No. 1770, Sheet 9). Kinimaka surviving husband of Kaniu was living there also, as natural guardian of Kalakaua, until he died in 1857.

Thereafter there is no evidence of the possession except that David Leleo and Moses two sons of Kinimaka were living on the premises as retainers or guards of Kalakaua after he became king.

Kaniu (w) the first life tenant conveyed all her interest to the premises to David Leleo the second life tenant in 1880. (See sheet 18) and died in 1901 (See Probate No. 3433 Sheet 33).

Moses K. Kinimaka, the remainderman conveyed his interest to Mary Atcherly, one of the children and heirs of David Leleo, in 1897 (see sheet 28). David Leleo died in 1884 leaving him surviving several minor children, among others Mary Atcherly, born in 1874.

It is to be noted that when David Leleo the second life tenant, purchased the interest of Kaniu the first life tenant, the rights of Kaniu (w) to possession of the land had become barred under the twenty year rule of the statute of limitations at least as against the first life tenant. When Mary Atcherly acquired an interest from her father on his decease in 1884 his rights had already become barred. The petitioner contents that the bar of the statute was never removed subsequent to 1878, because Mary Atcherly having inherited an interest in the life estate of Kaniu, after Kaniu was barred from enforcing her rights if any, bought from Moses Kanimaka the remainder of the estate in 1897, the whole estate merged and there was no right acquired, by Mary Atcherly which interrupted the running of the statute. Defendant, Mary Atcherly claims that the statute runs from the death of Kaniu in 1901 for she claims as remainderman and her "right so far as affected by the limitations * * *" shall

15 be deemed to accrue when the intermediate or prececent estate shall have expired by its own limitations" etc. Revised Laws Sec. 1990, third section.

I find that the petitioners and its predecessors in title have been in the open notorious hostile continuous adverse possession of the premises under color of title since 1858, unless the above contention of defendant be decisive.

The contention is not decisive however, for if the proceedings had in 1858 resulting in a decree are stare decisis at this time, then it is unnecessary to decide as to the statute of limitations.

In short it can not be said that it is unnecessary to decide as to the validity of the equity suit decree and the action of the parties thereafter because even if void the statute has run against the defendant. It would seem that there is merit in the contention that the statute has not run against defendant and therefore I consider first the question of whether under any theory the equity case No. 155 is not stare decisis in the case at bar. In examining the record of the case made out in 1858 I find that court then had before it the same points made by defendant's counsel here, as a basis of a claim that this court is not concluded by the decision of the Supreme Court in Kapiolani Estate v. Atcherly.

The Supreme Court there based its decision on the ruling that the court had jurisdiction of the parties, and that the decree was rendered after a hearing on the merits. (See 14 Haw. 662).

Defendant now contends that the court had no jurisdiction of the subject matter of the suit, in that the Commissioners to Quiet Title to Land had settled the matter prior thereto.

It is clear from the record that this same point was made before

Chief Justice Allen sitting as a chancellor in Equity and that after consideration he decided that he had jurisdiction.

Upon this decree the parties to the controversy acted and Kalakaua has been in possession with his successors in title to this day.

16 In Nov. 1858 the decree was rendered, which decided that

Kinimakawas not entitled to the property but that Kalakaua was so entitled, and ordered a conveyance accordingly. R. Armstrong was the guardian of Kinimaka minors a defendant in the case and the person ordered to convey the title to Kalakaua. In Dec. of that year he loaned to Kalakaua \$450 and took as security a mortgage by Kalakaua of his title to the premises in controversy. This speaks plainly of the view the parties took of the matter even if the words of the deed of mortgage were not as follows:

Premises "granted to said D. Kalakaua by a decree of the Chief Justice of the Supreme Court."

(See Examiner's Report Sheet 12).

The acquiescence of the parties is shown and the failure of Kaniu to assert any right to possession thereafter showed their view. The possession of Kalakaua and successors in title all show that they dealt with the property in reliance on the title as declared in the old decree. The title of Kalakaua has been built thereon.

In the above case, the court quoted approvingly from Van Fleet on Collateral Attack, page 4. "Where a court has erroneously held that certain things are sufficient to give jurisdiction and titles have been built thereon, the doctrine of stare decisis forbids the overruling of those decisions."

Therefore whether Chief Justice Allen was right or wrong in his view that he had jurisdiction of the subject matter, as contended for by defendant citing later decision of the Supreme Court, the decision is now stare decisis as to this case and should not be disregarded. Property rights for last fifty years have been built up, on this decree and the act of the parties therein. I am therefore of the opinion that defendant has no interest in the land in controversy.

17 As to the admission in evidence of Exhibits A and C, objected to by defendant as incompetent irrelevant and immaterial, being the pleadings and record in Equity No. 155 and Probate No. 1770 Estate of Lilia H. Kaniu, and the ruling having been reserved to be made with the decision. I overrule the objections to the second bill of complaint in Exhibit A and the record thereafter and to the consideration of Exhibit C, on the grounds that they are material, for the reasons contained in the foregoing opinion.

In my opinion the petitioner has a good title in fee simple as alleged and proper for registration subject to an easement for a right of way for a sidewalk over the corner of the street as shown on the map, and subject to the mortgage to The Trustees of Oahu College an Hawaiian corporation dated July 8, 1905, and recorded in book 275 page 44, to secure the sum of \$25,000, payable in three years at 6 per cent per annum.

Let the mortgagee file written consent to the registration of the mortgage, otherwise let a decree issue stating that the mortgage is not a registered mortgage.

Let the costs of the stenographer be divided between defendant Mary Atcherly and the petitioner, and other costs be borne by the parties contracting them.

Let a decree issue accordingly.

Signed

P. L. WEAVER, *Judge*.

Honolulu, Sept. 16, 1907.

Endorsed: Decision; Case 76; Filed Sept. 16, 1907, 10 A. M.
Court of Land Registration. (Signed) W. L. Howard, Registrar.

18

Copy.

TERRITORY OF HAWAII:

Court of Land Registration.

In the matter of the petition of Lewers & Cooke, Limited, Numbered 76, after consideration, the Court doth adjudge and decree that said Lewers & Cooke, Limited, an Hawaiian corporation, of Honolulu, in the County of Oahu, Island of Oahu, and Territory of Hawaii, is the owner in fee simply of that certain parcel of land situate in Honolulu, in the County of Oahu, Island of Oahu, and Territory of Hawaii, bounded and described as follows:

Beginning at the South corner of Queen and Punchbowl streets, said corner bearing, by true azimuths, 2 deg. 45 min., 28-8/10 feet, from the center of a sewer manhole, and being South 2946-9/10 feet and West 3634-6/10 feet, from the Punchbowl Trig. Station, and running, by true azimuths:

- (1) 321 deg. 32 min. 94-45/100 feet along Queen street;
- (2) 56 deg. 46 min. 158-4/10 feet along L. C. A. 729 to Kekuhaupio;
- (3) 323 deg. 10 min. 151-5/10 feet across same;
- (4) 53 deg. 57 min. 162-37/100 feet along L. C. A. 735 to Kaa-
humanu;
- (5) 51 deg. 18 min. 104-7/10 feet along same and L. C. A. 677 to
M. Kekaunaoa;
- (6) 317 deg. 05 min. 48-.9 feet along L. C. A. 677;
- (7) 46 deg. 20 min. 53-.7 feet along Mahele Award 61 to Na-
makeha;
- (8) 140 deg. 30 min. 521-.3 feet along Halekauwila street;
- (9) 257 deg. 58 min. 545-.3/10 feet along Punchbowl street to the
initial point;

containing an area of 148,362 feet, or 3.406 acres, being lot on Queen, Punchbowl and Halekauwila streets.

And the Court doth adjudge and decree that said land be brought under the operation and provisions of Chapter 154 of the Revised Laws of Hawaii; and that the title of said Lewers & Cooke, Limited,

to said land be confirmed and registered, subject, however, to any of the encumbrances mentioned in Section 2432 of said Revised Laws of Hawaii which may be subsisting; and subject also to

(1) Easement for right-of-way for a public sidewalk over a portion situated upon the immediate corner of Queen and Punchbowl streets, having a frontage of 5.2 feet on Queen street and a frontage of 5.55 feet on Punchbowl street, and a base line of 9 feet;

(2) Mortgage made by Lewers and Cooke, Limited, to the Trustees of the Oahu College, an Hawaiian corporation, dated July 8, 1905, to secure a note for \$25,000 payable in three years, with interest thereon at the rate of 6% per annum, said mortgage covering a portion of this land marked on the map filed in this case as "Lot No. 1 and Lot No. 2" and recorded in the office of the Registrar of Conveyances in Book 275 page 44, which is hereby referred to and made a part hereof and registered with the title.

Witness Philip L. Weaver, Esquire, Judge of the Court of Land Registration at Honolulu in said Island of Oahu the 16th day of Sept. in the year nineteen hundred and seven at ten o'clock and no minutes in the forenoon.

Attest with the Seal of said Court.

(Signed)

W. L. HOWARD, *Registrar.*

Endorsement: Decree of Registration, dated Sept. 16, 1907. Recorded, Vol. 1, page 95. Filed Sept. 23/07. 10 o'clock 30 min. a. m. (Signed) W. L. Howard, Registrar.

20

Copy.

In the Court of Land Registration of the Territory of Hawaii.

No. 76.

In the Matter of the Petition of LEWERS & COOKE, LIMITED, for Registration of Title to Land.

Notice of Appeal of Mary H. Atcherley to Supreme Court.

Now comes Mary H. Atcherley, respondent in the above entitled matter, and gives notice that she appeals from the decision of the Honorable P. L. Weaver, Judge of the Court of Land Registration, in said matter, rendered September 16, 1907, and from the decree in pursuance thereof, to the Supreme Court of the Territory of Hawaii, upon the following points of law:

1.

The said decision and decree are contrary to the evidence.

2.

The said decision and decree are contrary to the law.

3.

That the evidence shows that Lewers & Cooke, Limited, has no legal title to the land described in Apana 1 of L. C. A. 129, R. P. 1602 to Kinimaka.

4.

That the evidence shows that the respondent, Mary H. Atcherley, has title in fee simple to the land described in Apana 1 of L. C. A. 129, R. P. 1602 to Kinimaka.

5.

21 That petitioner, Lewers & Cooke, Limited, has no equitable title to or equitable interest in said land.

6.

That the Supreme Court of the Kingdom of Hawaii and the Honorable E. H. Allen, Chief Justice of the Supreme Court of the Kingdom of Hawaii sitting at Chambers, had no jurisdiction of the subject matter upon the petition of David Kalakaua filed against Richard Armstrong of the minor children of Kinimaka and Pai Equity No. 155 and no jurisdiction to make any such decree as was entered in the minutes of the Clerk of said Court in 1858 in said matter as the Board of Commissioners to Quiet Land Titles had exclusive and final jurisdiction over all rights to land arising prior to the creation of the Board and said petition of Kalakaua was founded on a claim by him that said Kinimaka was not entitled to the Award of said land at the time it was awarded to him by said Board of Commissioners to Quiet Land Titles.

7.

That the Supreme Court of the Hawaiian Islands in Probate and the Honorable G. M. Robertson Justice thereof sitting in Probate had no jurisdiction in 1858 to admit to probate the oral will of Lilia H. Kaniu of 1843 as there was no personal property shown to belong to the estate and the Board of Commissioners to Quiet Land Titles had exclusive and final jurisdiction over all rights to land arising prior to the creation of the Board.

8.

That the probate in 1858 of the will of Lilia H. Kaniu gave David Kalakaua no rights or interest of any kind in the land in controversy.

9.

22 That the Supreme Court of the Kingdom of Hawaii and the Honorable E. H. Allen Chief Justice thereof sitting at Chambers had no jurisdiction over the person of Moses Kapaaakea Kinimaka in said action brought by David Kalakaua against Richard Armstrong Guardian of the minor children of Kinimaka, and Pai for the reason that said Moses Kapaaakea Kinimaka was not named in said action as a party thereto and was not served with summons and entered no appearance.

10.

That the rendering of a decision and decree that Mary H. Atcherley, the grantee of said Moses Kapaakea Kinimaka has no title to said premises, based upon the proceedings before Hon. E. H. Allen in 1858 in the above named matter, without first allowing Mary H. Atcherley to contest the issues of law and fact in said equity case upon the merits deprives her of property without due process of law contrary to the provisions of section 1 of the 14th Amendment to the Constitution of the United States.

11.

That no decree was rendered in 1858 in said proceedings in equity against Moses Kapaakea Kinimaka.

12.

That the decree as described in the entry of the Clerk's minutes in said actions is erroneous and contrary to law and gives the petitioner Lewers & Cooke, Limited, no equitable right to a decree of title in this case in that the evidence given therein did not support any finding that David Kalakaua, petitioner in said case, had any right to a Land Commission Award for said land in 1849 or 1858, that he had never any title to said land; that any fraud, actual or constructive, had been committed by Kinimaka in his application before the Land Commission, that any contest was made on behalf of the minor Moses Kapaakea Kinimaka; that the record of said case does — show that at the time Kinimaka filed a petition before the Land

23 Commission David Kalakaua had no title to said land and no right to an award; that Kinimaka did not obtain an award by fraud; that Kinimaka had been granted an award for said land by the judgment of a court of competent jurisdiction both of parties and the subject matter to wit, the Board of Commissioners to Quiet Land Titles, which was not subject to collateral attack.

14.

That there has been no laches shown by Moses Kapaakea Kinimaka or by Mary H. Atcherley.

15.

That the respondent Mary H. Atcherley acquired no interest in said land by inheritance from her father on his decease in 1884, and inherited no interest in the life estate of Kaniu.

16.

That the Statute of Limitations does not commence to run against a remainderman whose right to possession is limited after two life estates until the death of both life tenants, though the life estates may have terminated prior to the death of the life tenants by forfeiture or merger.

17.

That the conveyance of Kaniu to David Leleo passed no interest in this land.

18.

That the conveyances to Lewers & Cooke, Limited, of these premises were made pendente lite, to wit, during the pendency of the ejectment case Law No. 4997 by Mary H. Atcherley vs. Kapiolani Estate Limited et al. and the Equity case No. 1246 of Kapiolani Estate Limited vs. Mary H. Atcherley brought to compel a conveyance by her and to enjoin the ejectment suit, and the petitioner herein had notice of the claim of Mary H. Atcherley before said conveyance.

24

19.

That no titles and property rights have been built on any decree of 1858 as against Mary H. Atcherley or her privy Moses Kapaakea Kinimaka.

20.

That the principle of stare decisis has no applicability to this case.

Honolulu, Hawaii, Sept. 20, 1907.

(Signed)

(Signed)

MARY H. ATCHERLEY,
By LYLE A. DICKEY,
Her Attorney.

Endorsement: No. 76. Court of Land Registration, Territory of Hawaii. In the Petition of Lewers and Cooke Limited. Notice of Appeal to Supreme Court of Mary H. Atcherley, Respondent. Petition No. 76. Court of Land Registration. Filed Sept. 23, 1907, 11 o'clock 06 min. A. M. (Signed) W. L. Howard Registrar. Lyle A. Dickey, 35 S. King St. Honolulu, Attorney for Mary H. Atcherley.

25 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

In the Matter of the Petition of LEWERS & COOKE, LTD.

Appeal from Court of Land Registration.

Argued January 21, 1908. Decided March 5, 1908.

Hartwell, C. J., Wilder and Ballou, JJ.

Limitation of Actions—Right of Remainderman.

Where land is devised to A for life, remainder to B for life, remainder to C in fee, and A conveys all his interest to B and then

outlives B, the statute of limitations does not begin to run against a grantee of C until the death of A.

Land Commission Award—Finality.

A land commission award is a final adjudication of all claims to the land awarded existing prior to December 10, 1845.

Equity—Nonenforcement of Erroneous Decree.

Upon a bill alleging breach of fiduciary duty in the obtaining of a land commission award a decree was rendered in 1858 ordering the guardian of the minor heirs of the awardee to convey the land. No conveyance was made. Held that the decree, being a collateral attack on a land commission award, was erroneous as a matter of law, and that the court of land registration in 1907 should not enforce it by registering the title of those claiming under the decree as against the outstanding legal title.

Opinion of the Court by Ballou, J.

This is an appeal by Mary H. Atcherley from a decree of the court of land registration registering the title of Lewers & Cooke, Ltd., to a parcel of land comprising portions of L. C. A. 129 to Kinimaka, L. C. A. 729 to Kekuhaupio and land described in the deed from the minister of the interior to estate of B. P. Bishop, dated July 8, 1899. The appellant claims title to all that part of the land covered by apana 1 of L. C. A. 129, R. P. 1602 to Kinimaka 23 and shows a complete legal title as follows:

1. Land Commission Award 129 to Kinimaka dated April 10, 1849.

2. Royal Patent 1602 to Kinimaka issued August 30, 1853, upon payment of the government commutation.

3. Will of Kinimaka, who died in 1857, devising all his property to his daughter, Kaniu Kinimaka, for her lifetime then to his son David Leleo Kinimaka for his lifetime, the remainder to his son Moses Kapaakea Kinimaka.

4. Death of the first life tenant, Kaniu, January 4, 1901, she having survived the second life tenant, David Leleo, who died in 1884.

5. Deed dated May 18, 1897, from the remainderman Moses Kapaakea Kinimaka, conveying all his interest as heir of Kinimaka to Mary H. Atcherley the present appellant, who was his niece and a daughter of David Leleo Kinimaka.

Against this chain of legal title the petitioner claims in rebuttal (1) adverse possession, and (2) equitable title by virtue of a decree in the supreme court dated November 2, 1858, in a case entitled David Kalakaua v. Pai and Richard Armstrong, Guardian, decreeing that Richard Armstrong, Guardian of Kaniu, David Leleo and Moses Kapaakea Kinimaka, minor children of Kinimaka, deceased

convey to Kalakaua, petitioner's predecessor in title, the land in controversy.

Although David Kalakaua and those claiming under him have been in possession of the land since the decree of the supreme court in 1858, they have acquired no adverse possession as against appellant, who claims by deed from the remainderman, Moses Kapaakea, sometimes called Kinimaka in the early proceedings. No right of action accrued to Moses Kapaakea until the death of the first life tenant on January 4, 1901, and the appellant, who had previously obtained a deed, brought ejectment in July of 27 the same year against the Kapiolani Estate, Ltd., then in possession of the premises, which suit is still pending. The fact that the first life tenant, Kaniu, conveyed in 1880 all her interest to David Leleo, the second life tenant, who died in 1884, did not accelerate any right to possession in the ultimate remainderman, but by the specific terms of our statute the appellant's right to commence an action must be deemed to have accrued when the first life estate would have expired by its own limitation. R. L. Sec. 1990.

It is urged that the first life estate became extinguished by merger in the second, so that the statute of limitations began to run upon the death of David Leleo, but the common law doctrine of merger, even if not precluded by the language of the statute, and if applicable to the prejudice of a stranger (Co. Litt. 338*b*) would have no application to the conveyance of a disseizee, whose deed would probably convey nothing at common law. *Mossman v. Hawaiian Government*, 10 Haw. 421. Still less could it apply to the conveyance of Kaniu in the present case, made at a time when her life estate had already been lost by the adverse possession of Kalakaua. *Moore v. Luce*, 29 Pa. St. 260.

Nor is the situation altered by the fact that appellant is the daughter of the second life tenant, for any estate *per autre vie* which she might have inherited at her father's death had long been barred, and even if she had acquired a right at that time it would have been no bar to the maintenance of her right subsequently acquired as grantee of the remainderman. *Angell, Limitations*, Sec. 375; *Wells v. Prince*, 9 Mass. 508. It is urged that a lost deed may be presumed, but we know of no case in which this doctrine has been invoked against a person in the situation of appellant, who does not claim under those who have suffered long and unexplained possession by the adverse party, but under the newly accrued right of a remainderman.

28 The equitable claim presents more difficulty. The appellant's ejectment suit against the Kapiolani Estate, Ltd., was met by a bill in equity filed by the latter admitting that the "bare legal title" was held by appellant, and praying that a conveyance by the present holder of that title might be decreed in conformity with the decree of 1858. Upon demurrer this court held that the bill stated a *cause* of action. *Kapiolani Estate, Ltd., v. Atcherly*, 14 Haw. 651. The case was remanded, and defendant

answered, after which the land now in controversy was sold by the Kapiolani Estate, Ltd., to the present petitioner, which applied to the court of land registration for a registered title. It is conceded on both sides that the court of land registration has authority to determine all questions, both legal and equitable, involved in the title to land, so that the question is substantially the same as that presented by the bill in equity brought by the Kapiolani Estate, Ltd.

A full statement of the facts leading up to the supreme court decree of 1858, as stated in the petition of the Kapiolani Estate, Ltd., may be found in the decision referred to. The record in the case now before us covers the same ground with some amplifications. Previous to the establishment of the land commission the land, according to the claim filed by Kinimaka, had been given him by Liliha. According to petitioner's contention it belonged to Kinimaka's wife Kaniu, who died in 1844, having made an oral will, then good according to the custom of the country, giving the property to her adopted child David Kalakaua, then an infant eight years old. Kinimaka, the husband of Kaniu, reported this will to the king, according to custom, but the king, according to the testimony of Governor Kekuanaoa before the probate court, disapproved it on account of the tender years of Kalakaua, and awarded the land to Kinimaka. Thereafter the board of land commissioners

was established and Kinimaka presented and proved his 29 claims and obtained an award. The land commission records show that in his petition, resulting in award 129, Kinimaka claimed three pieces of land in the same vicinity, the first as having been given by Leleahano to Hewehewa, thence to Kapiwi and to himself; the second as having been given by Kauileauli to Kaniu and by Kaniu to himself; and the third as having been received from Liliha, Kahikona being the witness. The testimony before the land commission apparently applied to one parcel only, and refers to Kaniu's previous ownership, no record appears of the witness Kahikona having been examined, but all three parcels were awarded, the third as claimed becoming apana 1, which is the land in controversy.

Upon coming of age David Kalakaua filed a bill in equity against Kinimaka to enforce a trust upon all the lands owned by Kaniu, claiming two pieces of land on Hawaii, one on Molokai, one-half of Keana on Oahu, and "certain houselots and small divisions of land in and near Honolulu" described in L. C. A. 129. Upon Kinimaka's death Kalakaua filed a suggestion of his death asking that his heirs be made parties, but apparently abandoned this proceeding and applied in probate for proof of Kaniu's oral will and for his appointment as administrator of her estate.

The probate court decided that a verbal will made prior to the organic laws of 1846 could be probated and that the provision of the old laws that the king and premier must be informed of all bequests of lands did not authorize the veto which had been exercised by the king in this case. The will was accordingly admitted to

probate and letters testamentary issued to David Kalakaua. Estate of Kaniu, 2 Haw. 82.

Armed with this decision, which, though not purporting in terms to deal with any intervening rights to the real estate, was a substantial recognition of his claim, David Kalakaua brought a new proceeding in equity covering only two houselots in Honolulu awarded by L. C. A. 129. R. P. 1602, an ahupuaa on Molokai and a taro patch on Oahu. The bill was directed against Pai, widow of Kinimaka, and Richard Armstrong, guardian of Kaniu, David Leleo and Kinimaka, minor children of Kinimaka. Pai and Armstrong answered, leaving petitioner to his proof of all material allegations except those of record, but averring "that if the awards have wrongfully been issued to the said Kinimaka, the same were issued upon testimony produced to the Board of Commissioners to quiet land titles, which satisfied that Board that the said Kinimaka was entitled to such award." Testimony for the petitioner was taken, apparently none being offered for the defendants, and the points made by counsel, including the defendant's claim that the land commission award was conclusive, are noted upon the record under date of August 10, 1858. The next papers that appear are a partial discontinuance and a decree, reading as follows:

Supreme Court. In Equity.

Before Chief Justice E. H. Allen.

"DAVID KALAKAUA

v.

RICHARD ARMSTRONG, Guardian of Kaniu, David Leleo and Kinimaka, Minor Children of Kinimaka. Dece'd.

"Now comes the plaintiff in the above entitled cause, and in consideration of certain sums of money paid by Kinimaka during his lifetime, for his use and benefit, relinquishes all right to any and all lands now included in the estate of the said Kinimaka and set forth in the petition in the above entitled cause, and discontinues my action for the same saving and excepting the land of Onoulimalo in the Island of Molokai, and the 1st apana of land set forth in Royal Patent No. 1602 filed in the cause, and hereby discontinues my action, as set forth in my Bill of Complaint, in the above entitled suit, except for the said land of Onoulimalo, and for the apana No. 1, Royal Patent No. 1602, herein above referred to.

(Signed)

"DAVID KALAKAUA."

31 Nov'b'r 2nd, 1858.

Supreme Court Room, Honolulu, Oahu.

"Endorsed: Supreme Court. David Kalakaua vs. Richard Armstrong Guardian of Kaniu, David Leleo — Kinimaka, minor children of Kinimaka deceased. Discontinuance except for Land Omulimalu & apana 1, Royal Patent No. 1602. Filed 2nd Nov'r, 1858. Jno. E. Barnard, Clerk Sup. Court."

"Supreme Court. In Equity.

2 Nov'r, 1858. At Chambers.

Before Hon. E. H. Allen, Chief Justice.

DAVID KALAKAUA

vs.

RICHARD ARMSTRONG, Guardian of Kaniu, David Leleo, and Kinimaka, Minor Children of Kinimaka, Deceased.

"The Court did order adjudge and decree in this matter that Mr. Armstrong, as Guardian of Kaniu, David Leleo, and Kinimaka, minor children of Kinimaka, deceased, do convey, to David Kalakaua the plaintiff in this cause, the land named Omulimalo on the Island of Molokai, and the first Apana of land set forth in Royal Patent No. 1602 filed in this cause.

(Signed)

"JNO. E. BARNARD,

"Clerk Supreme Court."

"Endorsed: Supreme Court. David Kalakaua vs. Richard Armstrong, Guardian of Kaniu, David Leleo and Kinimaka minor children of Kinimaka dec'd. Proceeding. 2 Nov'r, 1858."

There is no record that the conveyance decreed was ever made, David Kalakaua and his successors apparently relying upon the decree and their possession thereunder.

In the case of Kapiolani Estate, Ltd., v. Atcherley, 14 32 Haw. 651, it was decided that although the above proceedings were brought against the guardian the infants were bound by the decree and that it was the interests of the minors which were ordered to be conveyed. We are urged to reconsider that decision, particular stress being laid upon the many indications that the decree of 1858 was substantially a consent decree. We do not find it necessary, however, to review the ground already covered in that decision as we are of the opinion that an additional point not decided in the proceedings on demurrer is decisive against the right of the petitioners to a registered title, which would be substantially an enforcement of the decree of 1858.

The petitioner, in seeking to register a title depending upon the unexecuted decree in Kalakaua v. Pai and Armstrong is, as against the holder of the outstanding legal title, in the same position as a party asking the aid of a court of chancery in executing a former decree, and it is well established that he must take the risk of opening up such decree for reexamination. *Lawrence Mfg. Co. v. Janesville Mills*, 138 U. S. 552. Lapse of time seems to be no bar to the examination of the old decree, particularly when the alleged error is one of law and not a question of fact dependent upon testimony which might be no longer available. In *Hamilton v. Houghton*, 2 Bligh. 169, the House of Lords refused in 1820 to enforce a decree made in 1780. In *Johnson v. Northey Finch's Prec.* in

Chancery 134, the decree opened was apparently about fifteen years old. In *Lawrence v. Berney*, 2 Rep. in Ch. 127, it was twenty-seven years after the unexecuted decree that "this Court desired to be excused, in making it its own Act, to build upon such ill Foundations, and charging his own Conscience with promoting an apparent Injustice." In *Wadhams v. Gay*, 73 Ill. 415, and *Gay v. Parpart*, 106

U. S. 679, the situation was somewhat similar to the case at bar in that the parties had neglected to get a conveyance of the legal title in pursuance of an equity decree, and the courts held the decree, which was made in 1851, unenforceable because erroneous, the state court decision being rendered in 1874 and the supreme court decision during the 1882 term.

Applying the principle of these cases to the case at bar, we are of the opinion that the decree in *Kalakaua v. Pai and Armstrong* was erroneous in assuming the power to order *Kinimaka's* successors in title to convey land which between the date of the oral will of *Kaniu* and the decree of 1858 had been awarded by the board of land commissioners to *Kinimaka*.

A full history of the creation and proceedings of the land commission would be but a repetition of the history of land titles in this country already discussed many times. The statute creating the land commission is given in the Revised Laws of 1905, p. 1160, and the principles adopted by the land commission and given the force of law by resolution of the legislative counsel on p. 1164. The effect of these statutes and of the awards under them is discussed in *Keelikolani v. Robinson*, 2 Haw. 522; *Estate of Kamehameha IV.*, 2 Haw. 715; *Kahoomana v. Minister of Interior*, 3 Haw. 635; *Kenoa v. Meek*, 6 Haw. 63; *Harris v. Carter*, 6 Haw. 195; *Thurston v. Bishop*, 7 Haw. 421. One quotation must suffice to give a brief outline of the history of the land commission:

"There is a time in the history of every original nation not formed by colonization, when as it emerges from barbarism into civilization, titles to land may be said to have a beginning by positive institution of the people of such nation. Previous to the advent of Christianity to this country, in the early part of this century, *Kamehameha I.*, as King by right of conquest, was the lord paramount and owner of all the land of this Kingdom. This right continued in his successors until the reign of *Kamehameha III.* Under this King a government, under a constitution and laws, had its birth, superseding a government of the arbitrary will of the King.

"Claims of one character and another to the possession of land had grown up, but there was no certainty about them, and all was confusion; and finally, after years of discussion had between the King, the chiefs, and their foreign councillors, the plan of a Board of Commissioners to Quiet Land Titles was evolved, and finally established by law, for the purpose of settling these claims and affording an opportunity to all persons to procure valid paper titles emanating from the Government representing the sovereignty, the source of all title to land in this Kingdom, to the land which they claimed. As a part of this scheme *Kamehameha III.*, with unex-

amplified magnanimity, relinquished his claim of ownership as sovereign to over two-thirds of the entire territory of the Kingdom, in order that the same might be awarded to the chiefs and common people by the Land Commission. The Commission was authorized to consider possession of land acquired by oral gift of Kamehameha I., or one of his high chiefs, as sufficient evidence of title to authorize an award therefor to the claimant. This we must consider as the foundation of all titles to land in this Kingdom, except such as come from the King, to any part of his reserved lands, and excepting also the lists of Government and Fort lands reserved. The land in dispute in this case is not one of those specifically reserved by the King, Kamehameha III., to himself and his successors, and not being in the lists of lands specially set apart as Government or Fort lands, must be one of those over which the Land Commission had jurisdiction to award to the claimant." *Thurston v. Bishop*, 7 Haw. 421, 428.

The land commission was a board for the investigation and final ascertainment or rejection of all claims of private individuals to any landed property acquired before the passage of the act, on
 35 December 10, 1845. By Sec. 7 of the act creating the commission its decisions were only subject to appeal to the supreme court, and in the absence of such appeal were final. It considered equitable claims as well as legal (*R. L.*, pp. 1169, 1175) so far as those terms could be applied to the kind of titles theretofore existing. Among the benefits to result from the awards, the commission laid down and the legislative counsel approved and enacted: "All parties having been cited before awarding, there can be no counter claims to the same piece of land after award, except on appeal, and such appeal cannot be taken except by a party who has presented his claims to the Board." *Principles of Land Commission*, *R. P.*, p. 1177.

Every consideration of history and policy seemed to add weight to this express statutory enactment, and in every case since the land commission in which the validity of one of its awards has been questioned the award has been held conclusive against every form of attack. Even before the claim now in question had arisen the court, in 1851, had refused to go behind a land commission award and receive evidence of its having been obtained by fraud, the court saying:

"The Land Commission may have decided wrong, but if so, Gill or Kalua, both of whom had notice of the award, could have appealed to the Supreme Court, agreeably to the statute in such case made and provided. In that Court they could have shown fraud, want of title, or anything else affecting the case; but it cannot be done here, under the circumstances. If we are to go into these cases anew, treating the awards of the Land Commission and the Supreme Court as nothing, then there is no security for any man's real estate—no rest for his title—and the whole kingdom will be afloat."
 —*Kukiiabahu v. Gill*, 1 Haw. 54.

In 1883, Kalakua, then king, and Kapiolani, his wife, filed a

36 bill in equity in regard to certain lands claimed by Kapio-lani under one Kaunuohua who had procured awards reading "To Kaunuohua for W. L. Moehonua," alleging that the latter name had been fraudulently and erroneously inserted, Moehonua not being a claimant before the land commission and no evidence having been offered in his favor. In sustaining a demurrer, the court said:

"We are not to assume after this lapse of time that the Land Commission had no authority for issuing the award they actually did issue. It was undoubtedly an award in favor of Moehonua. The failure to record evidence to sustain it does not vitiate it, although if the question were opened it would be provable against it." *Kalaka-kau et al. v. Keaweamahi et al.*, 4 Haw. 577.

In a case shortly after this, upon a bill in equity to declare a trust, it appeared that the heading of a land commission award was "Mahuka and Kaai" but the land was awarded to "Mahuka." The evidence before the land commission was introduced to show not only that the witnesses had testified, but that the claimant Mahuka had specifically admitted, that his brother Kaai had equal rights with himself. The court held the award to Mahuka conclusive, saying:

"The law in this case, respecting the examination of proceedings before the Land Commission, has been placed by this Court, in the cases of *Kukiiahu vs. Gill*, 1 Haw., 54, and *Bishop vs. Namakalaa*, 2 Haw., 238, on a foundation which cannot be disturbed. Every year which passes increases the force of the reason which demands that the adjudications of the Land Commission be not now reexamined." *Kaai v. Mahuka*, 5 Haw. 354.

The next case involving this point was the application for the probate of an alleged lost will of *Kakauluohi*, premier of the kingdom, which came before Justice Judd in 1876. The circumstances were similar to those in the *Estate of Kaniu*, that is, an alleged will made prior to the land commission, and the court held
37 the award of the land commission, made after the date of the alleged lost will, conclusive against the right to probate a will which differed from the award. The court said:

"But the Land Commission was authorized by law to 'investigate, confirm or reject all claims to land arising previously to the tenth day of December, 1845,' and as the will in this case vested the property at the date of the death of the testator (the 7th of June, 1845), the action of this Commission in awarding the lands as mentioned above without the entail to the survivors is conclusive against the right to prove a will now which would divert the property differently than awarded.

"Their action was a judgment of a Court of competent authority upon a matter within its jurisdiction, it being a 'claim for land arising previously to December 10, 1845,' *Kanaina vs. Long*, 3 Haw., 332; *Kahoomana vs. Minister of Interior*, *Ib.* 635.

"But the case of *Estate of Kaniu*, 2 Haw., 82, is referred to by the counsel for the petitioner. In this case Justice Robertson admitted a verbal will to probate, made in 1843, and although the land

the testator had had been awarded to Kinimaka, and not to the devisee. I cannot believe that the attention of the learned Justice was called to this point, or he would not have thus practically set aside an award of the Land Commission of which Board he was a member." *Estate of Kekauluohi*, 6 Haw. 172.

Finally, in the leading case of *Thurston v. Bishop*, 7 Haw. 421, the absence of a land commission award was held conclusive against claimants under Kamehameha V, who had received the land by oral bequest before the establishment of the land commission, but who was still a minor when the time for filing claims before the land commission expired. The point of infancy was strongly urged, but the court held the minor bound by the neglect of his guardian to present this claim, saying:

"The statute made no exception in favor of infants, and we
38 can make none. By Section 7 of the Act creating the Land Commission, it was to make its decisions 'in accordance with the principles established by the Civil Code of this Kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of absentees, tenancy and subtenancy, primogeniture and rights of adoption.' * * *

"It is to be noticed that the subject of 'infancy' is not mentioned. This is an additional reason for not admitting the disability of infancy as an exception to the statute. Claims of infants were presented by their parents or guardians. A large number of awards to Lunalilo and Victoria Kamamalu show this. These high chiefs who succeeded to the lands of Kekauluohi and Kinau respectively, both being infants at the time of the presentation of their claims, received awards for land exceeding any other claimants in number and extent." *Thurston v. Bishop*, 7 Haw. 421, 434.

Besides the cases above cited there are numerous dicta extending throughout the Hawaiian reports substantially to the effect that a title based on an award and patent is "good against all the world" (*Kekiekie v. Dennis*, 1 Haw. 42), or is final" (*Keelikolani v. Robinson*, 2 Haw. 522, 539, 551.) The decisions cited, however, mainly in cases involving the estates of the sovereigns or high chiefs of the kingdom, appear sufficient to sustain the contention that none of the grounds alleged in David Kalakaua's petition, including fraud and infancy, were sufficient to warrant the court in reviewing, in a collateral proceeding, the award of the land commission.

The only apparent exception to this line of cases is the probate case of *Estate of Kaniu*, 2 Haw. 82, already referred to, which was the foundation of the claim of David Kalakaua and through him of the petitioner in this case. The actual decision of that case was not
39 in conflict with the principles above cited, for the estate of Kaniu consisted of personal as well as real property, and the decision was to admit the will to probate, which would be by no means conclusive upon the rights of Kinimaka claiming any or all of the real estate under his land commission award. The language of the opinion, however, indicates that all Kaniu's land would

pass to Kalakaua and in this respect the case was, as we have seen, expressly criticized and disapproved in *Estate of Kekauluohi*, 6 Haw. 172.

If this court, therefore, shall enforce the decree of 1858, or by registering the title of the petitioner treat the decree as enforceable, it will be the first time in the judicial history of Hawaii that a land commission award shall have been set aside upon any pretext whatever. This we are unwilling to do. Apparent error on matters of evidence or upon which testimony is no longer available may well be condoned after a long lapse of time, but the question here is on a fundamental principle of Hawaiian law. It is immaterial whether Kinimaka had received the land from Liliha or from Kaniu, and whether, if from Kaniu, he was guilty of actual fraud in procuring his land commission award or whether he acted under the honest belief that the disapproval of Kaniu's will by the king and the verbal giving of the lands to him was conclusive.

The objection to the decree of 1858 appears to go to the jurisdiction of the court over the subject matter, for the land commission award was the final decision of a court of record which was the only court of competent jurisdiction to decide claims to land accruing prior to its establishment, and its decisions could not be attacked except by the appeal provided by law. *Thurston v. Bishop*, 7 Haw. 421, 437. Even if the objection did not go to the jurisdiction of the court the result would be the same, for under the principle of *Lawrence Mfg. Co. v. Janesville Mills*, 138 U. S. 552, already discussed, this court would not lend its aid in executing a decree
40 which though rendered by a court having jurisdiction, was found to be erroneous. If, as has been suggested, the enforcement of the old decree is a matter of discretion, we may take into account the circumstances that the probate decision in *Estate of Kaniu*, so far as it may have indicated that the title to the real estate was vested in Kalakaua, notwithstanding the intervening land commission award, was made without that point having been raised and considered and for that reason has been practically overruled; together with the further circumstances that the decree in *Kalakaua v. Pai and Armstrong* has all the appearances of a compromise decree, consented to by the guardian of minors, it having been made without any decision by the court upon the grave question of law involved, without any disposition of the previous case of *Kukiiiauhu v. Gill*, 1 Haw. 54, which it would seem necessary to distinguish, and having been entered by the clerk only after the plaintiff had discontinued as to other lands identically situated. Nor, if it is a matter of discretion, can the petition plead laches on the part of the appellant. The appellant's legal rights are clear and not barred by laches, which at law are measured by the statute of limitations. The petitioner is in the position of the moving party asking substantial relief against the legal situation, and would appear to be in no better position than appellant as regards laches. The decree of *Kalakaua v. Pai and Armstrong* stood unenforced for over forty years. Kalakaua and his successors in title took no steps to have it enforced apparently because they were in possession of the land, but

under the will of Kinimaka their possession was subject to fresh attack at the death of each of the successive life tenants. Moses Kapaakea Kinimaka, on the other hand, took no steps to have the decree set aside, if such procedure were possible, for the equally cogent reason that he would have no interest in doing so unless he survived the two life tenants. Upon the maturing of his rights the appellant, as his successor in title, acted promptly in bringing ejectment.

The decree of the court of land registration is reversed and the case remanded for further proceedings in conformity with this opinion.

Lyle A. Dickey (E. M. Watson with him on the brief) for Mary H. Atcherley.

W. A. Greenwell (Castle & Withington on the brief) for Lewers & Cooke, Ltd.

(Sig.)

ALFRED S. HARTWELL.

(Sig.)

A. A. WILDER.

(Sig.)

SIDNEY BALLOU.

Endorsed: No. 308. Supreme Court Territory of Hawaii. October Term 1907. In the Matter of the Petition of Lewers & Cooke, Limited. Opinion. Filed March 5, 1908, at 10 o'clock A. M. J. A. Thompson, Clerk.

42 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

In re Application of LEWERS AND COOKE, LIMITED, for a Registered Title to Land.

Appeal of Mary H. Atcherley.

Petition for Rehearing.

Lewers and Cooke, Limited, respectfully petition for a rehearing in the above entitled cause on the decision made by this court on March 5, 1908, on the following grounds:

1. That the decision is in conflict with an express statute.
2. That the decision is in conflict with controlling decisions, to which the attention of the court was not drawn through the neglect or inadvertence of counsel.
3. That questions decisive of the case and duly submitted by counsel have been overlooked by the court.

I.

The decision is in conflict with an express statute, viz.: Revised Laws, Sec. 2407, as amended by Act 43 of the Session Laws of 1907.

The court seems to have overlooked, in the decision of the case, and as the appellant in her brief opened it by stating that "this

43 is an appeal on points of law" the respondent did not think it necessary to call attention to the change in the appeal made by Act 43 of the Session Laws of 1907, that before the passage of that act appeals were allowed to the Supreme Court in the same manner as appealed from the decision of the Circuit Judge in Chambers. By that act the section was amended so as to provide that "appeals solely upon points of law shall be allowed from any final order, decision, judgment or decree of the court." Appeals on questions of fact are allowed to the Circuit Court. By this amendment the appellate statute is brought in line with appeals from the District Court, and this court has no power to examine any question other than a pure question of law. It cannot decide the questions of fact, or the mixed questions of law and fact.

When the decision is examined it will be perceived that the court has treated this case as if it were an appeal in equity. The question may be asked, where the difference lies in this particular case. The answer is very simple, for the attitude of the court is colored all through the case with the unconscious impression that the Supreme Court was deciding the case on the facts. This alone would seem to us to warrant a re-hearing.

But again, conceding, for the purpose of this point, that the other propositions are pure questions of law, the question whether the land court would, as "matter of discretion," enforce the old decree is a question for that court to decide on the facts; whereas, this court has decided it on the facts and reversed the decision of that court on the facts.

The only question before this court is whether the land court had discretion to enforce, and as this court decides that they have discretion, this court cannot reverse that decision, as it has done in this case.

44

II.

Controlling Decisions.

We respectfully and earnestly suggest that this case is in conflict with numerous decisions of the Supreme Court of the United States, which are controlling upon this court and which, by the neglect or inadvertence of counsel, who relied with confidence on three decisions of this court on this very title, in the last of which, rendered in 1903, every point raised in this case was presented and argued upon this very title and decided against the appellant, a fact in the case found by the land court in its decision, were not brought to the attention of the court.

In order to apply these controlling decisions, it may be remarked that the proceeding—or proceedings, whichever it is—against Kinimaka and Armstrong as Guardian is an action in equity to enforce a trust, and, if an attack on the judgment of the land court at all, is well settled is not a collateral attack or review of the award. The purpose of the action was to have it declared that Kinimaka held the award exactly as it was adjudged, but in trust for Kalakaua, to

be turned over to him when he came to age. It is necessary, in order to present the facts, to add facts to those stated by the court in its opinion and to correct one fact there stated. The error into which the court has fallen is the statement that Governor Kekuanaoa testified before the probate court that the king disapproved of the award on account of the tender years of Kalakaua and awarded the land to Kinimaka. His testimony in that case—he did not testify in the equity case—was, as given in the Estate of Kainu, 2 Haw. 82, that he was so informed by the Premier.

The facts to be added are that it was alleged in the equity suit of 1858 that Kaniu left the property to Kalakaua, but in
45 charge, during his minority, of Kinimaka, that he procured the fraudulent issue of the patent in his own name, that the will of Kaniu had been probated, that the title at the time of Kinimaka's decease was in Kinimaka in trust for Kalakaua, and the prayer was that it be decreed that "Kinimaka did, during his lifetime procure the award and hold possession of the above mentioned land for the use and benefit of your orator." The proceedings of 1858, August 18 and 19, at the hearing are substantially as follows:

Mr. Bates admitted that at the time of making the will the whole property was given to David; that at the time of her death she said to her husband, standing by at the time, that she wished him to take charge of all her property which she had willed to David.

Mr. Harris claimed that "Kinimaka had no right to them; that he was not entitled to an award in his own right, but as the guardian of David Kalakaua under the will of Kaniu he was entitled to an award."

Kanu testified, in 1848, that "the reason Kinimaka got the land was because he appeared for her other heirs. I understood the land then to belong to David. * * * Kinimaka spoke to me as if the land was David's as the mother had ordered it to be. Kinimaka acted as a sort of steward to David to look out for his property. The king knew about this, Kanoha, and the queen, and the men all about. I was sitting with the Premier at Lahaina when Kinimaka came in to tell her the news about his wife's death, and he told her about Kaniu's will. Kinimaka told the Premier at that time that David was to be her heir."

Cross-examination by Mr. Bates. When Kinimaka came to the king and chiefs he gave in an account of his own private lands, and at the same time he gave an account of this land. It was decided that David should be the Konohiki under the king. I always supposed that David was entitled to the land, and this is a new thing—Kinimake claiming the land. Kinimaka was a favorite of the king. (Mr. Bates admitted that David commenced an action as soon as he was of age against Kinimaka before he deceased.)

Old Blue Laws of 1847, 1848 and 1849 put in.

J. H. Smith was sworn and introduced the testimony in the land court.

Puniwai testified that David was the Konohiki of the place, and lived there; according to Kaniu's will, it was his place, but was managed by Kinimaka. "The place was David's, but Kinimaka

had all to do with it. I was there at the time Kaniu instructed Kinimaka to take charge of it for David. Kinimaka was agreeable to this arrangement." Kahina lived upon the land; David lived there. Kaniu willed the place to David, but Kinimaka had charge of it for David. Kinimaka always declared the place was
45 David's and that he was to take charge of it while David was young. David our chief.

Mr. Harris produced the record in the former action to show that it had been commenced against Kinimaka in his lifetime, and claimed "that Kinimaka, having assumed the trusteeship, was bound to make it known on every occasion." Especially claims Royal Patent 1602, L. C. A. 129.

From this it clearly appears that when Kinimaka procured the award to himself on April 10, 1849, he was the guardian or trustee of Kalakaua, who was a minor, to whom the property had been given, as admitted in the case, under the express charge that he should care for the property which had been given to David; that it was understood, when Kinimaka applied for the land, that he was applying for David, whom he acted for, and whom he declared was under his charge and whom he admitted to be the owner, but claimed that he had charge of it during David's minority; that he procured the award to himself, and as soon as David came of age he commenced an action to have the property turned over to himself.

It is also necessary to add that the decision in *Kapiolani Estate v. Atcherley*, 14 Haw. 651, was rendered on an appeal made in pursuance to a stipulation, which we find has been by accident omitted from the record, to submit "the question of *res judicata* to the adjudication of the Supreme Court," that the question of *res judicata* might be "first adjudicated and settled, thereby determining whether further litigation between the parties hereto is necessary or not." The material part of the stipulation, however, is set out in the decree of Judge Humphreys, which recites that it is pursuant to a stipulation and which shows that the purpose of the appeal was to submit the question of *res judicata* to the Supreme Court; and to add what we have already stated, that the land court found that every question raised in that court was presented to the court in the case of *Kapiolani Estate v. Atcherley*, *ubi supra*.

47 Our contentions are:

(a) That under the controlling decisions of the Supreme Court of the United States and the decisions of this court, equity had jurisdiction of this action.

(b) That the decisions in 1858 and 1903, being adjudications upon this title, and property rights having been acquired under them, this court is bound to follow these decisions under like controlling decisions of the Supreme Court of the United States.

A.

In 1858 the Supreme Court, under the Constitution, had jurisdiction in equity. Under the Judicature Act, the chief justice was the chancellor of the kingdom and had "power at chambers to entertain bills in equity for the discovery of fraud." (Sec. 8) "Said

chief justice shall have all the equity powers incident at common law to the office of chancellor." (Sec. 9) "They shall have full power to compel executors, administrators and guardians to the performance of their trusts." (Sec. 18.)

In 1855 the court had declared its authority in an action to reach property to apply on an execution, quoting from a distinguished jurist whose judgment in an equity matter is relied on in the opinion in the case at bar:

"Lord Redesdale observed, in *Bond v. Hopkins* (1 Sch. & Lef. 420), 'Nothing is better settled in Courts of Equity, than that, where a title exists at law, and in conscience, and the effectual assertion of it at law is unconscientiously obstructed, relief should be given in equity; and that when a title exists in conscience, though there be none at law, relief should also, though in a different mode, be given in equity.'"

Dana v. Angel, 1 Haw. 195.

And the doctrine of a constructive trust was further determined and numerous authorities cited in a case decided in 1862, where the court held that trusts arising from operation of law are expressly excepted from the statute of frauds, that a trust may be established

48 where the consideration of a deed moves from the complainant and not from the grantee, and that the trust may be shown in opposition to the language of the deed.

Montgomery v. Montgomery, 2 Haw. 563.

Even in an action of ejectment testimony was admitted in an action at law in a collateral proceeding to show error in the award, the court saying that if it appeared that the award was issued to one who made no claim before the land commission, that would be for the purpose of showing an error in the award and not for the purpose of reviewing the decision of the commission.

Bishop v. Namakalaa, (1860) 2 Haw. 238.

In a case decided in 1859 it was held that the certificate of the land commission was prima facie evidence of the right of the party. This was also an action of ejectment, and the whole award was gone into to show that the claimant presented it in the interest of another for the purpose of determining to whom the award really was made.

Kalama v. Kekuanaoa, 2 Haw. 202.

And in *Jones v. Meek*, decided in 1857, it was held that a right-of-way not presented to the board was not concluded by their decision, being an incident of the parties to the land.

Jones v. Meek, 2 Haw. 9.

And in 1851 it was held that a royal patent of earlier date did not prevail over a land commission award for a kuleana, since the king could not convey a greater title than he had.

Kekiekie v. Dennis, 1 Haw. 42.

This case must be determined with reference to the state of the law in 1858; but subsequent decisions only confirm the view taken

by Chief Justice Allen that he had jurisdiction to award land to a minor whose guardian, having the absolute right of disposition, had procured a title to himself, where it was admitted that the minor immediately upon coming of age sought the benefit of the decree. There was nothing peculiar about the judgments of the land court to make them more sacred or potential than the judgments of other courts against those who had been defrauded by the judgment. In fact, there would seem to have been a reservation as against absentees. It was a court of record, and adjudication was one in which "all parties in interest were obliged to take notice."

Kahoomana v. Minister, 3 Haw. 635.

That a bill to reform a patent would lie, under certain circumstances, has been recognized by this court.

Perry v. Lucas, 11 Haw. 350.

That a court of equity can set aside the decree of a probate court, has been held.

Wei See v. Young Sheong, 3 Haw. 489.

Akeau v. Iakona, 13 Haw. 216.

In the latter case, the court said:

"The general rule is that equity may relieve against every species of fraud and so many set aside or annul decrees or judgments obtained through fraud; but that it cannot set aside or annul for fraud decrees or judgments admitting wills to probate is an exception established almost as firmly as the rule itself—whether the reasons for the exception are good or not."

Akeau v. Iakona, *ubi supra*.

The doctrine that judgments can be set aside for fraud has been frequently recognized in this jurisdiction.

Norris v. Herblay, 9 Haw. 514.

Mills v. Briggs, 4 Haw. 506.

See Hop v. Parke, 6 Haw. 688.

H. Hackfeld v. Bal, 6 Haw. 364.

None of the cases cited by this court lay down a different rule.

In the case of *Kukiiahu v. Gill*, 1 Haw. 54, the grantor of the defendant, moving to set aside the award by a collateral attack in an answer in trespass, was a party to the proceeding before the Land Commission and claimed that the plaintiff had "practiced fraud upon the Land Commission in obtaining his award." The fraud referred to in the opinion of the court in that case, and quoted by this court, was not fraud extrinsic the proceeding, but fraud appearing in the proceeding, which he could have appealed against to the Supreme Court. The defendant did not allege that any fraud had been practiced on him to deprive him of his right to be heard.

In *Kalakaua v. Keaweamahi*, 4 Haw. 577, the court merely decided that *Moehonua*, who procured the award and who was an ad-

ministrator, having taken the award to himself, this was an "open and constant repudiation of any trust," notice to the plaintiff's grantor of adverse possession of over 20 years, the court distinguishing *Bishop v. Namakalaa*, 2 Haw. 238, because that suit was brought within 9 years after the award.

In the *Mahuka* case there was no contention that there was fraud, but (1) that the award was to Kaai as well as to Mahuka, and (2) that the evidence showed, contrary to the decision, that Kaai was a tenant in common; but the court held that the award was to Mahuka alone, that this was not sufficient evidence to raise a trust in Mahuka, that the presumption was that Kaai assented to the award to Mahuka alone, and presumed that he may have relinquished his claim by an unrecorded deed now lost.

Kaai v. Mahuka, 5 Haw. 354.

The decision of Mr. Justice Judd in the 6th of Haw. merely denied to probate a will, and was sufficiently disposed of by the Judge in holding that it was not proved, not regarded as a will, what he says in regard to the Estate of Kaniu was unnecessary to the decision. It is enough to say of this decision rendered in 1876 that in a case cited, when before the Supreme Court, on the law side, the Kaniu case was referred to with approbation. *Kalakaua v. Keaweamahi*, 4 Haw. 571.

This last decision was by the full bench, Chief Justice Judd a member, rendered in 1883.

The case of *Thurston v. Bishop* is not in point. Infants are bound by a decree of the land court. We are contending that in 1849 *Kini-maka* as the guardian had the right of absolute disposition of this land (it being prior to the statute of 1851), that the duty devolved upon him to present *Kalakaua's* claim, that he presented it but took an award in his own name, which was a constructive fraud, and that as soon as he came of age and entitled to the land he brought a suit, not to set aside the award, but to have it declared held in trust for him.

That such a suit would lie has been frequently determined by the Supreme Court of the United States in controlling decisions. The general rule has been laid down by that court as follows:

"Where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner and compel him to convey the legal title."

Stark v. Starr, 6 Wall. 419.

Bagnell v. Broderick, 13 Pet. 436.

Patterson v. Wrenn, 11 Wheat. 380.

The rule has been applied by the Supreme Court of the United States to courts which are exactly of the character of the land court in Hawaii. For instance, when California was acquired, the Mexican titles were all approved by a land commission, and the grants thus approved have been held to be not open to col-

lateral attack. Equitable rights as well as legal are foreclosed if not presented.

Barker v. Harvey, 181 U. S. 480.

But this has not prevented the application of this rule, and that court said, in cases of fraud or mistake, where forgery had been resorted to and names were erased and the commissioners were induced by false swearing to confirm the claim:

"Courts of equity have full jurisdiction to relieve against fraud or mistake, and that power plainly extends to cases where one man has procured the patent which belonged to another at the time the patent was issued."

Meador v. Norton, 11 Wall. 442.

"The substance of these authorities is, that wherever a person obtains a legal title to land by any artifice or concealment, or by making use of facilities intended for the benefit of another, a court of equity will impress upon the land- so held by him a trust in favor of the party who is justly entitled to them, and will order the trust executed by decreeing their conveyance to the party in whose favor the trust was created."

Felix v. Patrick, 145 U. S. 317, 328.

Bernier v. Bernier, 147 U. S. 242.

These cases are taken from our brief in *Barker v. Harvey*, *ubi supra*, where we contended, successfully, that the Mission Indians were estopped by the judgment for two reasons: (1) That the judgment was a conclusive determination, and (2) that the judgment determined that no trust relation existed by reason of which they could control the patent after it was issued.

The same court also laid down the rule in another case, saying: "If, for any reason recognized by courts of equity as a ground for interference in such cases, the legal title has passed to one party, when, in equity and in good conscience, it ought to go to another, a court of equity will convert him into a trustee."

Johnson v. Towsley, 13 Wall. 85.

53

And this rule has been repeatedly recognized.

"The only remedy of *Emblen* is by bill in equity to charge *Weed* with a trust in his favor. All this is clearly settled by previous decisions of this court."

Bockfinger v. Foster, 190 U. S. 116.

Most of these cases arise under patents and adjudications of the land department; but some of them arise under adjudications of courts on land claims, special tribunals of exactly the same character and power as the one at bar. We specially emphasize the fact that the rule is laid down alike in each case.

B.

It is well settled that an adjudication that a particular case is of equitable cognizance cannot be disturbed by an original suit. Such adjudication is not void even if erroneous.

Mellen v. Moline Malleable Iron Works, 131 U. S. 352.

In that case it was held that a decision that a particular case was of equitable cognizance was valid as against a purchaser pendente lite, the court saying:

"Purchasers of property involved in a pending suit may be admitted as parties, in the discretion of the court; but they cannot demand, as of absolute right, to be made parties, nor can they complain if they are compelled to abide by whatever decree the court may render, within the limits of its power, in respect to the interest their vendor had in the property purchased by them pendente lite. *Eyster v. Gaff*, 91 U. S. 521, 524 (23:403, 404); *Union Trust Co. v. Inland Navigation and Improvement Co.*, 130 U. S. 565 (32:1043); 1 Story, Eq. Jur. Sec. 406; *Murray v. Ballou*, 1 Johns. Ch. 566. As said by Sir William Grant, in *Bishop of Winchester, Paine*, 11 Ves 194, 197, 'The litigating parties are exempted from the necessity of taking any notice of a title so acquired. As to them, it is as if no such title existed. Otherwise, such suits would be determinable; or, which would be the same in effect, it would be in the pleasure of one party at what period the suit should be determined.' The present proceeding is an attempt, upon the part of a purchaser pendente lite to relitigate, in an original, independent suit, the matters determined in the suit to which his vendor was a party. That cannot be permitted consistently with the settled rules of equity practice.

Mellen v. Moline Malleable Iron Works, *ubi supra*.

54 Can there be any distinction because the judgment was favorable to the purchaser instead of unfavorable? It could not be binding one way and not binding the other. It is suggested that, going into the land court, we took a risk of opening up the matter. This decision shows that it cannot be opened up. The case of 1858 and the case of 1903 are each *stare decisis*. The latter is the law of the case between the parties, having been rendered by a tribunal from which then no appeal could be taken. If it be said that this point was not expressly passed on in the 14th of Haw., the answer is that the question was thoroughly presented and argued as found by the land court—every question here presented was presented and argued in that case. The court in that case say that the point was made in the 1858 case by counsel that "the Board of Land Commissioners made a re-distribution and gave an award covering these lands to Kinimaka and none to David, and that, no appeal having been taken from the award, the latter was final and the complainant was estopped from re-examining the matter." (Page 656.)

It thus appears that the question did not escape the attention of the court, and, although the main contention considered in sup-

port of the demurrer was that the minors were not bound, after disposing of that the court continued: "The old decree is claimed by respondent to be erroneous for the further reason that upon the facts and the evidence adduced in that proceeding in 1858, the court erred in holding that Kinimaka, and after him his heirs, was a trustee of the legal title for the benefit of Kalakava." (Page 662.) And then declined to re-examine the former proceedings, or refused to enforce the decree.

The concurring opinion of Chief Justice Frear disposes of the case of *Lawrence Mfg. Co. v. Janesville Mills*, 138 U. S. 552, and cites *Buchanan v. Knoxville & O. R. Co.* 71 Fed. 324, which points out that that case was an attempt "to piece out an incomplete consent decree," adding, from the case quoted: "That is a very different case from that of a party who stands on a complete decree and seeks no other benefit or advantage than that which is due by the general law from a former judgment."

We might add that Chief Justice Fuller, who delivered the opinion in the *Lawrence Mfg. Co.* case, in a later case spoke of the rule of that case as an "exceptional rule" in a case where he refused to reopen the question of jurisdiction raised and overruled in the original case.

New Orleans v. Fisher, 180 U. S. 185.

The language cited by Chief Justice Frear is applicable to every case cited by this court in their opinion.

In *Gay v. Parpart*, 106 U. S. 679, it was held that the proceeding was incomplete, and, even as to this incomplete decree, the purchaser pendente lite, "was bound to know, when he purchased, the inconclusive character of the decree pro confesso," taken without any actual service on Parpart, which could be set aside, and was set aside in this instance.

The English decisions illustrate the points already made. It must be remembered that in equity originally there was no appeal. A bill of review was necessary in order to get error reviewed in a higher court; and that is still the law in the United States courts. Remembering this fact and the distinction between a default decree or consent decree and a decree where the court has passed upon the matter judicially, we observe that in the case of *Hamilton v. Houghn*, 2 Bligh, P. C. 169, the original decree was held "not conclusive until reversed by original bill or bill of review." In that case it was held that there were no proper parties before the court, the surviving trustee, who represented the parties attacking the decree, not being before the court, and that the decree was not adverse. Attention was called to the fact that it was pro confesso, and it was said that the court could not make a decree which would be binding without the proper parties before it. In this case there was a bill to review the original bill.

In *Johnson v. Northey*, Finch's Proc. in Ch. 134, there was a default decree, and, in addition to the original bill to enforce the decree, which was not complete, there was a cross-bill to set aside

the original decree, and the court said, after a long debate, that they would look into this default decree.

Other English cases might be cited to the point that the court will allow a default decree to be opened.

In *Lawrence v. Berney*, 2 Rep. in Ch. 127, the ill foundations built upon were these: The complainant had allowed an action at law for the premises to go to judgment against him, without having applied for an injunction. Execution was issued on the judgment and he was dispossessed. He then brought an original bill to regain possession and to enforce the original judgment. A cross-bill was brought to reverse the original judgment. They were heard together, and the court said that if the original judgment had been complete and it required nothing more than the process of the court to enforce it, that he still would have been entitled to the benefit of that judgment, although erroneous; but that, when he allowed judgment against him at law, without interposing a bill for an injunction, and was dispossessed, and was driven to an original bill, these were ill foundations to resist the bill to reverse the original decree.

In the case at bar no new process was necessary to enforce the original decree. It could have been enforced by attachment. It was enforced by taking possession and the yielding possession. It was further enforced by the guardian's taking a mortgage, reciting that the property had been conveyed by judgment of the court and releasing the land under the mortgage.

57 So far as these cases are concerned, they seem to us to absolutely sustain the position of the court in the 14th of Haw.

But by these same controlling decisions *Lewers & Cooke, Limited*, who purchased under three decisions of the Supreme Court confirming the equitable title and the right to the possession in the *Kapio-lani Estate, Limited*, had a right under the Constitution of the United States to rely on these decisions as *stare decisis*.

Thus, in a case where the Supreme Court of the United States had twice pronounced the same opinion on the same title, that court said:

"Where questions arise which affect titles to land it is of great importance to the public that when they are once decided they should no longer be considered doubtful. Such decisions become rules of property, and many titles may be injuriously affected by their change. Legislatures may alter or change their laws, without injury, as they affect the future only, but where courts vacillate and overrule their own decisions on the construction of statutes affecting the title to real property, their decisions are retrospective and may affect titles purchased on the faith of their stability. Doubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change. Parties should not be encouraged to speculate on a change of the law when the administrators of it are changed. Courts ought to be compelled to bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well considered and solemn judgments. The decision of the Supreme Court of Michigan, in

conformity with the opinion of this court, twice pronounced on the same title, is hereupon affirmed, with costs."

The Minnesota Min. Co. v. The National Min. Co., 3 Wall. 332.

This case has been repeatedly followed in reference to real estate, and applies to personal property as well. Thus, that court said recently, on a bond decision, where the parties were not the same as in two actions in which the question had been presented to that court, "that the matter is *res judicata*, or, if not, should, upon the doctrine of *stare decisis*, be regarded as foreclosed;" adding:

58 "Stare decisis is a wholesome doctrine. It is not of universal application, and there have been cases where a ruling once made was wisely changed; but when the decision is one affirming the validity of bonds, notes, or bills of a limited amount, the issue of which had been in terms authorized by statute, such decision should generally be held conclusive, even as to those not strictly parties to the litigation; for otherwise, as we have said, much wrong might be done to innocent holders who bought in reliance upon the decision."

Vail v. Arizona, decided Dec. 2, 1907, Advance Sheet, p. 107.

The doctrine of *stare decisis* and the rule of *res judicata* both apply in this case, the latter because the case in the 14th of Haw. was submitted to the Supreme Court for the purpose of determining whether the decision of 1858 was *res adjudicata* between the parties, and the court determined that question. This decision was the law of the case, binding between the parties and their privies, and could not be reversed on a subsequent appeal.

Notley v. Brown, 17 Haw. 455.

And that decision included not only what was expressly decided, but what was impliedly decided.

U. S. v. The Nuestra Senora de Regla, 108 U. S. 92.

It is not necessary, however, on the question of *stare decisis*, to go into the question of whether it was impliedly decided that the court of 1858 had jurisdiction, although if we did it would be possible to cite numerous cases in this court where petitions for rehearing have been denied because a question must have necessarily been considered by the court and was not overlooked; but the very question itself was decided in passing upon the question of jurisdiction over the parties. In the case of 1858 it was only impliedly decided by the court that it had jurisdiction over the minors. It was expressly decided that it had jurisdiction of the subject matter, and in the case in the 14th of Haw. two things are decided upon this point: That, although the court has erroneously decided that it has jurisdiction where titles have been built thereon, the doctrine of *stare decisis* forbids the overruling of those decisions, citing Van Fleet, Coll. Attack, p. 4; and, further, that the attack made on the judgment in defense of the

bill in equity to enforce it is a collateral attack, and that the question of lack of jurisdiction cannot be raised, citing *Sharon v. Terry*, 35 Fed. 337, that "an attack on a judgment in a proceeding to revive it is a collateral attack." (*Kaliolani Estate v. Atcherley*, 14 Haw. 660, 661). And Chief Justice Frear says, in his concurring opinion: "There can be no doubt that this attack is collateral" and that if it is a question of error it cannot be raised on the collateral attack, and concludes: "To hold that the question is one of error rather than of jurisdiction, and so that the decree is not subject to collateral attack, is in entire harmony with the decision in *Meek v. Aswain*; and former practice, as regarded in a number of the cases above cited, greatly emphasizes the propriety of upholding former decrees as far as possible under circumstances like the present." (pp. 665, 666)

While all this was said primarily of the question of whether the court had jurisdiction of the person of the minors, it is equally applicable as to whether the court had power to set aside a judgment of the land court. That it had jurisdiction in equity of the general subject cannot be denied. It may have been error, but that the Supreme Court had jurisdiction in cases of alleged breach of trust and of fraud to set aside judgments is too plain to need the citation of authorities. At most this was an error in regard to the power of a court and not of its general jurisdiction over the subject matter. How much stronger is the case of *Lewers & Cooke, Limited*, here, who bought under a decision declaring that this judgment was insusceptible to collateral attack on the ground of jurisdiction, who saw that on the record the point was raised that there was no jurisdiction to set aside the land court decree, and who put their good money in on the faith of the declaration of this court. If it be said that the point as raised in the 14th of Haw. was that the court erred in holding that it had jurisdiction, the answer is that there is no distinction in urging that the court in fact had no jurisdiction. The error in so holding was as vital to the judgment and more clearly raised when it appeared to have been raised on the record of the court, because it was held in *Mellen v. Moline Malleable Iron Works*, *ubi supra*, that the adjudication is not void even if erroneous.

The judgment of 1858 is not only a solemn judgment, long relied on as a rule of property, which should not be overruled although erroneous,

The Lottawanna, 21 Wall. 571.

National Bank v. Whitney, 103 U. S. 102.

Goodtitle v. Kibble, 9 How. 478.

Gilman v. Philadelphia, 3 Wall. 724.

Wright v. Sill, 2 Black 544.

Saranac Land Co. v. Comptroller, 177 U. S. 326.

but in this case, the court having laid down a rule by which a right to property has been determined, the property having been pur-

chased by the appellant relying on that rule, the court cannot disregard its previous opinion.

Grignon v. Astor, 2 How. 343.

The Propeller Genesee Chief v. Fitzhugh, 12 How. 458.

Neves v. Scott, 13 How. 272.

Muhlker v. New York & H. R. Co., 197 U. S. 544.

The latter case holds that when a person acquires his title and is assured of valuable rights under it, no change in the decision of the court can deprive him of the rights thus acquired; and in that case the Supreme Court reversed the Court of Appeals of the State of New York upon this proposition.

61 The case at bar is much stronger than the cases cited. The petitioner here, Lewers & Cooke, Limited, when it paid for the land to the Kapiolani Estate, Limited, found them in possession of the land, having been in undisputed possession for nearly 50 years under a judgment of the highest court of the land, which in that judgment declared that it had jurisdiction of the subject matter and had authority to decree that the guardian convey the land to Kalakaua. They knew that the guardian himself had taken a mortgage of the land from Kalakaua, reciting that it had been conveyed by this decree. They knew that no direct attack had been made upon this judgment—as none has been today. They knew that an action had been brought to recover possession, and that a bill in equity had been brought by the Kapiolani Estate, Limited, an injunction secured, and that on a subsequent proceeding, by the agreement of the parties and the judgment of the court, the case had been taken to the Supreme Court to determine whether the decision of 1858 was res judicata. They knew that for three years no attempt had been made to set aside this decision, if it could be set aside, and that that decision declared that an attack such as is made in the present proceeding is a collateral attack and not a direct attack, and that upon such collateral attack errors in regard to jurisdiction could not be taken advantage of where passed upon in the case itself, and that, although the court might re-examine the propriety of the original decree, yet it was not bound to do so; and as no fraud was alleged in obtaining the original decree, and that decree is not incomplete, was adversary and not by consent, had been rendered for more than 40 years and was followed by sole and undisputed possession of the land, the decree would not be re-opened. They knew that this decree, rendered upon demurrer, was the settled law of the case, and could not be re-examined on a second appeal.

2 Thompson v. Maxwell Land Grant & R. R. Co., 168 U. S. 448.

Northern Pacific R. R. Co. v. Ellis, 144 U. S. 458.

They knew that a mistake by the Supreme Court in 1858 as to having the power to set aside a judgment of the land court, if such as their action, was binding in a collateral proceeding.

Insley v. United States, 150 U. S. 512.

They also knew that if they bought they could rely on this judgment on the principle of stare decisis.

They knew that a change of the personnel of the court did not warrant a change of judgment, and, knowing these things, they thought they could rely upon these decisions of this court, and bought the property relying upon them.

In the case at bar nothing has been introduced to change the case which was before the court in 1903.

III.

Questions Duly Submitted and Overlooked by the Court.

We shall endeavor to be brief on these points, as, to our mind, the controlling decisions of the Supreme Court of the United States and the assuming that the discretion of the lower court on the facts could be controlled by this court ought to justify a rehearing at least of the case, in which these matters could be duly presented; but when we come to the considerations submitted by us, they seem to us largely to have been overlooked by the court.

The court below had held that we could not avail ourselves of our adverse possession. We dealt lightly with that in our brief; the one proposition which we made upon this point was based on a consideration which influenced the decision of the Mahuka case, that the court should presume a lost deed, since our possession was under a judgment adverse not only to the life-tenant but to the reversioner, and was characterized by the judgment itself and
63 further by the act of the guardian, who was to have given the deed, in recognizing that such a conveyance had been made.

The court falls into an error affecting this very matter when it is suggested that "Moses Kapaakea Kinimaka, on the other hand, took no steps to have the decree set aside, if such procedure were possible, for the equally cogent reason that he would have no interest in doing so unless he survived the two life-tenants." Such a proceeding was "possible." It is difficult to see why the court should suggest its impossibility. But is it true "that he would have no interest in doing so unless he survived the two life-tenants?" He had a present vested interest which he could sell and convey, not a contingent remainder.

We further suggested that if the decree was a compromise decree, then it rested on a valuable consideration. Kalakaua had given up his right in the other lands, in consideration of receiving these, and, possession having followed the parole exchange, equity would not interfere.

Again, the respondent here did not commend herself to a court of equity, coming into this court with her rights barred by a limitation under two estates and buying the right, title and interest of the remainderman and resting exclusively on his equities.

In our brief or in the oral argument we did not urge "that the first life estate became extinguished by merger in the second." Nor did we claim adverse possession in any other sense than we have above urged.

When we come to the other branch of our brief we find nothing in the opinion upon what counsel on the other side term the whole of our brief, viz:

"The decree of 1858 is decisive of the question between the parties.

(a) This is the law of the case, having been so held in *Kapiolani Estate v. Atcherley*, 14 Haw. 651.

(b) Under the doctrine of *stare decisis* the precise point having been passed on, this court should uphold that position.

64 To meet this, counsel for Mrs. Atcherley urged this court to overrule the case of *Kapiolani Estate, Limited, v. Atcherley*. In their opinion and in ours it was necessary to overrule that case in order that Mrs. Atcherley should prevail. It was conceded by counsel on both sides that the parties were in the same situation before the land court as if they were before the equity court, and a bill of revive or a supplemental bill had been filed. In fact, the records in those cases show that the purpose of taking up the land action was to save further litigation and take a short cut to a decision. This court, however, after referring to the fact that they were urged to reconsider the decision in *Kapiolani Estate, Limited, v. Atcherley*, say that they do not find it necessary to review the ground already covered, because an additional point not decided on the proceedings on demurrer is decisive against the rights of the petitioner. This leaves the question whether *Kapiolani Estate, Limited, v. Atcherley* is overruled or not in the air. If it is not overruled, on the return of this case, what is the land court to do? The case in the 14th of Haw. stands, and is decisive of the case. This decision stands and is alike decisive of the case. Nor is the petitioner in the land court any more asking the aid of a court of chancery to execute a former decree than the *Kapiolani Estate, Limited*, was in that case.

We have already covered the law on these points, and we respectfully submit that under the controlling decisions already cited the points which we have made, that the case in the 14th of Haw. is to be followed under the rule of *stare decisis* and is to be followed because it is *res judicata*, are completely sustained, and we find nowhere in the opinion any consideration of either question.

If it be said that we are not entitled to a rehearing because the court has not overlooked these points, although it has said nothing upon them, we ask, is not the same rule to be applied to

65 the case of *Kapiolani Estate, Limited, v. Atcherley* in the 14th of Haw.?

Kapiolani Estate, Limited, v. Thurston, 17 Haw. 346.

Godfrey v. Rowland, 16 Haw. 502.

Young Hin v. Hackfeld, 16 Haw. 789.

particularly as the court in that case clearly had the question in mind and the decision was rendered upon a decree purporting to submit the question whether the decree of 1858 was *res judicata*, and the decision of the court was to that effect.

Furthermore, this court has overlooked our contention that the judgment in the decision of 1858 that that court had jurisdiction is

right, and that it is not even an error in the exercise of its jurisdiction. That court was a court of general jurisdiction, and, the proceedings being in accordance with the court of equity, every presumption will be indulged in favor of jurisdiction.

Harvey v. Tyler, 2 Wall. 340.

Galpin v. Page, 18 Wall. 366.

and the decision of that court, reinforced by its decision in 1903 of its own jurisdiction, is conclusive.

Davis v. Packard, 8 Pet. 323.

The judgment of this court, rendered in the 14th of Haw., is not alterable as applicable to this title.

Bank of the U. S. v. Moss, 6 How. 40.

and particularly such judgment will not be interfered with after lapse of time.

11 Cyc. 701.

Again, it is not necessary that there should be jurisdiction upon the facts of a particular case. An error in that respect is a mere error in the exercise of jurisdiction. There must be jurisdiction of the general class of cases, but it is well settled that courts of equity have the power to set aside judgments.

11 Cyc. 669.

State v. Neville, 110 Mo. 345; 19 S. W. 491.

66 After the decision by the court in the 14th of Haw. it was the settled law that the 1858 judgment will be enforced, and not even a question of jurisdiction could be raised after that decision.

Magwire v. Tyler, 17 Wall. 253.

We respectfully submit that if any case could be presented warranting reconsideration by this court, the case at bar is that one. We frankly admit that counsel relied with perhaps too great confidence on three decisions of this court upon this title and thought it unnecessary to cite the numerous decisions in the Supreme Court of the United States controlling the decision in this case. It purchased in good faith, trusting in these decisions. It relied on the fact that the uncontradicted evidence in the original case showed that the title of the appellant rested in fraud and was held under a constructive trust for Kalakaua, and that no claim had been made contrary to the judgment for 50 years. It relied on well-considered decisions that a court of general jurisdiction, having jurisdiction of the general subject matter, could determine its own jurisdiction in a particular case, which was conclusive, particularly after a long period of time. It relied on the fact that the land court, having discretion in the matter, had exercised its discretion in its favor.

We submit that in a case of this importance, in principle and amount involved, where three solemn judgments of this court have been pronounced in favor of the title, an opportunity ought to be

given for a further argument of the cause before the judgment of the Court of Land Registration is set aside.

Dated, Honolulu, March 23, A. D. 1908.

Respectfully submitted,
(Signed)

CASTLE & WITHINGTON,
Attorneys for Lewers & Cooke, Limited.

67 I, David L. Withington, certify that I am of counsel for Lewers and Cooke, Limited, petitioner for re-hearing in the above entitled proceeding; that in the preparation of the foregoing petition I have examined the decision of which review is sought, and the statutes and decisions referred to in the petition, and that in my opinion the questions set forth in said application for a re-hearing upon which the reconsideration of this court is sought are of sufficient importance and gravity to warrant a re-hearing of this cause.

And I further certify that this petition is not filed for the purposes of delay, but to secure such re-hearing.

Dated March 23, 1908.

(Signed)

DAVID L. WITHINGTON.

[Endorsed:] Original —. No. —. Supreme Court Territory of Hawaii. In Re Application of Lewers and Cooke, Limited. For a Registered Title to Land. Petition for Re-Hearing. Filed at 4:30 P. M. March 23, 1908. Henry Smith, Clerk. Jud. Dept. Castle & Withington, Attorneys for Lewers & Cooke, Ltd.

68 In the Supreme Court of the Territory of Hawaii, October Term, 1907.

In the Matter of the Petition of LEWERS & COOKE, LTD.

Petition for Rehearing.

Argued April 20, 1908.

Decided May 4, 1908.

HARTWELL, C. J., WILDER and BALLOU, JJ.

Appeal and Error—petition for rehearing denied.

The petition for rehearing in the case of In re Lewers & Cooke, Ltd., 18 Haw. 625, is denied, the petition disclosing no substantial grounds within the rule and oral argument not leading the court to modify its previous conclusions.

Opinion of the Court by Ballou, J.

The petitioner's petition for a rehearing of the decision in this case (In re Lewers & Cooke, Ltd., 18 Haw. 625), contained the usual averments that the decision was in conflict with an express statute and with controlling decisions and that questions decisive of

the case and duly submitted were overlooked by the court, but upon oral argument upon the petition the argument was devoted almost wholly to a restatement and reargument of the case in general. The case thus presented is naturally stronger than when counsel have not the advantage of an opinion of the court as a basis for argument, but aside from the lack of any substantial showing bringing the case within the usual rule for rehearing (*Ung Wo Sang Co. v. Alo*, 7 Haw. 306), we have not been led to any change in the conclusion arrived at upon the previous hearing.

The petition alleges that the previous decision is in conflict with an express statute, viz., R. L. Sec. 2407 as amended by Act 43 S. L. 1907. This statute provides that appeals from the court of land registration solely upon points of law may be taken to the supreme court, and upon issues of fact to the circuit court sitting with a jury. The alleged conflict is summarized in the allegation that "the attitude of the court is colored all through with the unconscious impression that the supreme court was deciding the case on the facts." As there has been no reversal of any finding of fact of the court of land registration and counsel upon argument could specify none, the point warrants no further notice.

The controlling decisions which it is alleged were not brought to the attention of the court through neglect or inadvertence of counsel are for the most part the long line of Hawaiian decisions cited in the previous briefs and commented on at length in the decision. Besides these some cases from the Supreme Court of the United States were cited where the judgments of a land commissioner sitting in California to decide claims under Mexican land grants had been attacked in equity. It is sufficient to contrast the statutory enactments regarding the Hawaiian land commission (R. L. pp. 1160, 1164), with the statute relied upon in the leading case cited to the effect that "the final decrees rendered by the commissioners or by the District or Supreme Court of the United States or any patent to be issued under the act shall be conclusive between the United States and the said claimants only and shall not affect the interests of third persons. 9 Stat. at Large, 634;" *Meaders v. Norton*, 11 Wall. 442, 457.

Other cases hold that a land patent from the executive department of the government or a right adjudicated by a local board of limited jurisdiction may be decreed in equity to be held in trust for the person beneficially entitled. *Johnson v. Towsley*, 13 Wall. 72; *Rector v. Gibbon*, 111 U. S. 276, but in these cases also the language of the statutes and the character of the board are essentially different, particularly in the absence of the direct appeal to the Supreme Court provided by the Hawaiian statute. In instances where the doctrine of these cases applies it makes no difference that the plaintiff has contested the case to the highest tribunal or officer having jurisdiction (*Rector v. Gibbon*, *supra*), yet it would hardly be contended that after an appeal from the Hawaiian land commission to the Supreme Court, a contestant could begin again in a court of equity.

There was also an attempt to distinguish the cases cited in Law-

rence Mfg. Co. v. Janesville Mills, 138 U. S. 552, on the ground that in no case was a party allowed to take advantage of the neglect of his predecessor in title to obey the decree alleged to be erroneous. This distinction is nowhere recognized in terms, and outside of the question of its application to the case of minors whose guardian neglected to convey, it is not supported by the cases. In *Hamilton v. Hamilton*, 2 Bligh 169, the appellant's ancestor, Sir John Stewart Hamilton, was in default in the nonpayment of money; in *Johnson v. Northy*, Finch Prec. in Chan. 134, the respondent's predecessor Lady Lovelace, was in default in the nonexecution of an absolute decree in a contested case. As to the American cases, we do not think that *Gay v. Parpart*, 106 U. S. 679, was decided on the narrow ground that the decree of partition failed to order a conveyance, and in *Lawrence Mfg. Co. v. Janesville Mills*, 138 U. S. 552, 561, no stress whatever is laid upon the incompleteness of the first decree, but it was assumed for the purposes of the decision that the defendant was bound and consequently in default.

It is contended that while the doctrine of "the law of the case" is not technically applicable to the case at bar owing to the difference in parties, yet the principle of *stare decisis* should be applied and this particular property should be treated as governed by the law of the decree of 1858 even though now thought to be erroneous. *Bibb v. Bibb*, 79 Ala. 437. The doctrine of *stare decisis* in this sense, however, is applied only when the rights of innocent purchasers for value have intervened as to the particular property, and the petitioner in this case, which is the only party claiming to have bought for value, bought *pendente lite* with the knowledge of appellant's pending action in ejectment and of the counter petition in equity admitting that the legal title was outstanding and praying for the enforcement of the old decree. It is in the same position as that of *Windett* in *Gay v. Parpart*, 106 U. S. 679, 696.

71 It is also urged that the petitioner had a right to reply upon the decision in *Kapiolani Est. v. Atcherley*, 14 Haw. 651. In that case, however, there was no decree or other formal action of the court fixing the rights of the parties. The decision was on demurrer which is by no means conclusive as predicting the final determination of the case after the defendant has answered and brought evidence to sustain its own version of the facts, together with such new points as could not be raised upon the face of the complaint. This is particularly true in a case in which the action of the court was apparently to be a matter of discretion. After that decision the defendants answered at length and the *Kapiolani Estate, Ltd.*, did not press the case to trial but sold to the present petitioner with the case still pending. If the petitioner was entitled to rely on anything it would be only upon the general principles of law announced by the court in its decision, to be gathered by a comparison of the two concurring opinions. For certain reasons there stated, mainly involving practice in suits against minors, the court were of the opinion that the decree of 1858 should not be reopened for examination, apparently in the sense of a retrial of the cause upon the testimony of

witnesses. The court in the present case upon a principle of law there alluded to, namely, that the decree of 1858 was erroneous in fundamental principle, reached the conclusion that that decree should not be enforced. We are still of the opinion, although

72 the question appears to be somewhat academical, that that is not an overruling of the previous decision.

We are unable to find anything affecting the rights of the applicant in the circumstances that shortly after the decree of 1858 A. strong, who had been guardian of the minors, took a mortgage in his individual capacity from Kalakaua, reciting that the land in question had been "granted to said D. Kalakaua by a decree of the Chief Justice of the Supreme Court." Were the opinion of A. strong on the effect of the decree in any way material we should draw the inference that he thought it was self executing, which might explain his neglect to make a conveyance.

We are also unable to find anything material in a stipulation in the Kapiolani Estate, Ltd., v. Atcherley, alleged to have been accidentally omitted from the record in this case, whereby, after answer and answer, the answer was withdrawn and an amended bill filed subject to a general demurrer and appeal from a pro forma dismissal in order to effectuate "the desire of both counsel for plaintiff and defendant herein that the question of res judicata under the proceedings in equity set up in plaintiff's bill of complaint herein be adjudicated and settled, thereby determining whether further litigation between the parties hereto is necessary or not." While we find nothing in the stipulation which would improve the position of the plaintiffs in that case or the present petitioner as its successor in title we are of the opinion that the opinion and decision of the supreme court upon the appeal should not be controlled, limited or construed by any reference to a stipulation of parties concerning the purpose of the appeal.

The petition for rehearing is denied.

Lyle A. Dickey and E. M. Watson for Mary H. Atcherley.

D. L. Withington and R. B. Anderson for Lewers & Cooke, Ltd.

(Sig.)

ALFRED S. HARTWELL

(Sig.)

A. A. WILDER.

(Sig.)

SIDNEY BALLOU.

73 Endorsed: Supreme Court Territory of Hawaii. October Term, 1907. In the Matter of the Petition of Lewers & Cooke, Ltd. Opinion on Petition for Re-Hearing. Filed March 1908, at 10 o'clock A. M. J. A. Thompson, Clerk.

74

Court of Land Registration, Territory of Hawaii.

No. 76.

LEWERS AND COOKE, LIMITED, Petitioners.

Decree.

This court having on Sept. 16, 1907, made a decree registering title to all the lands described in the petition herein, including that portion of the land which lies within the boundaries described in Apana or Lot 1 of Land Commission Award No. 129 issued to Kinimaka, Royal Patent No. 1602, marked on the map filed herein as Lot 1, the title of petitioner to said lot being contested and claimed by Mary H. Atcherley, and upon appeal to the Supreme Court by Mary H. Atcherley said court having rendered a final decision on May 6, 1908, reversing the decree of this court and ordering that a final decree be entered by this court denying the petition to register that portion of the lands described in the petition by Mary H. Atcherley; now, therefore, it is

Ordered, adjudged and decreed that the decree of this court of September 16, 1907, be and the same is hereby set aside, and the petition of Lewers and Cooke, Limited, for registration of the lands in said petition described is denied; And it is further Ordered, Adjudged and Decreed that the petitioner has no title, legal or equitable, to that portion of the land described in the petition included within the boundaries of Lot 1 of Land Commission Award No. 129, Royal Patent No. 1602 issued to Kinimaka.

Honolulu, May 22, 1908.

(Sgd.)

P. L. WEAVER, *Judge.*

Endorsed: Petition No. 76. Decree. May 22/08. Court of Land Registration. Filed May 22 1908 9 o'clock 10 min. P. M. (S) W. L. Howard.

75

In the Court of Land Registration, Territory of Hawaii.

Petition No. 76.

In the Matter of the Application of LEWERS AND COOKE, LIMITED, to Register and Confirm Their Title to Land.

Notice of Appeal of Lewers and Cooke, Limited, Petitioners, to the Supreme Court of the Territory of Hawaii.

Lewers and Cooke, Limited, Petitioners in the above entitled matter, appeal and give notice that they appeal from the decree made and entered in this cause on May 22, A. D. 1908, in favor of the respondent, Mary H. Atcherley, and against these petitioners, and from the whole of said decree, to the Supreme Court of the

Territory of Hawaii, and specify as points of law upon which the said appeal is taken the following:

1. That said decree is contrary to the decision heretofore rendered in this cause on September 16, A. D. 1907, by the Hon. Phillip L. Weaver, Judge of this court.

2. That said decree is contrary to the law.

3. That said decree is contrary to the evidence.

4. That said decision and the evidence upon which it is based show that Lewers and Cooke, Limited, have a legal title to the land described in Apana 1, of L. C. A. 129, R. P. 1602 to Kinimaka, and are entitled to register their title thereto.

76 5. That said decision and the evidence upon which it is based show that Lewers and Cooke, Limited, have if not a legal title, an equitable title to the premises Apana 1, L. C. A. 129, R. P. 1602 to Kinimaka, and are entitled to register their title.

6. That said decision and the evidence upon which it is based show that Lewers and Cooke, Limited, as successor-in interest to Kalakaua, have a legal title in the premises described; in that it will be presumed from the decree in Equity No. 155 rendered November 2, A. D. 1858, from the recital in the mortgage from Kalakaua to Armstrong and the release of that mortgage, and from the continued possession of the premises, by Kalakaua and his successors in interest that a conveyance was duly made of the legal title as directed by the decree.

7. That the decree of the Hon. G. H. Robertson, Justice of the Supreme Court of the Hawaiian Islands, admitting to probate the oral will of Lilia H. Kaniu on May 3, A. D. 1858, is a binding and conclusive adjudication upon the respondent, Mary H. Atcherley, that David Kalakaua was, after the death of Kaniu, down to and at the time of the award, beneficially entitled to the premises awarded and patented to Kinimaka, and described as Apana 1, L. C. A. 129, R. P. 1602, and that Kinimaka held the same as his trustee and guardian.

8. That the decree of the Supreme Court of the Hawaiian Islands made by the Hon. E. H. Allen, Chief Justice thereof, on November 2, A. D. 1858, in Equity No. 155, is a conclusive adjudication between the parties that Kinimaka took the award and patent in question in trust and that Kalakaua and his successors in interest, including these petitioners were and are the equitable owners of the premises as against Moses Kapaakea Kinimaka and his successor in interest, the respondent, Mary H. Atcherley, entitled to a conveyance of the legal title; that said decree is a complete
77 and final decree, not subject to be reviewed or re-opened at this time.

9. That the decree of the Supreme Court of the Hawaiian Islands, in Equity No. 155, referred to, if not adversary in its character and entered by consent, was entered upon a valid consideration, viz., the abandonment of the claims of Kalakaua to other lands claimed by the respondents in that action, and, as such a compromise, having been acted on and assented to for more than

forty years, should not be disturbed at this date, and is binding and conclusive upon the respondent, Mary H. Atcherley.

10. That the decision of the Supreme Court of the Territory of Hawaii rendered in Equity Case No. 1246, Kapiolani Estate, Limited, v. Mary H. Atcherley, on April 7, A. D. 1903, is an adjudication binding on said Mary H. Atcherley and conclusively determining as to her that the decision and decree in Equity No. 155 rendered on November 2, A. D. 1858, by the said Hon. E. H. Allen, Chief Justice of the Supreme Court of the Hawaiian Islands, is binding and conclusive upon the parties to said action and Mary H. Atcherley as the successor of one of said parties, that the same is a complete decree and should not be re-opened or reviewed after more than forty years have elapsed since its rendition, and is conclusive as against Mary H. Atcherley of any rights, other than the bare legal title, in the premises.

11. That the said decrees of the Hon. G. H. Robertson and the Hon. E. H. Allen, and said decision of the Supreme Court in the case of the Kapiolani Estate, Limited, v. Atcherley, are and each of them is a rule of property laid down by the highest court of the jurisdiction in reference to the identical property in litigation here, and that under the facts found by the decision in this cause the rule of property therein laid down should be followed and the title of the petitioners registered to the premises in dispute.

12. That the decisions last above referred to and each of them should be followed by the court, on the principle of stare decisis.

13. That the decision by the Supreme Court in the case of Kapiolani Estate, Limited, v. Atcherley having been rendered on a stipulation and for the purpose of determining between the parties whether the decision in Kalakaua v. Armstrong rendered in 1858 was res judicata between the parties, and the parties having consented to the matter being determined in the present litigation, that case still pending, the opinion is the law of this case, should have been followed and the title of this petitioner registered.

14. That Lewers and Cooke, Limited, having bought on the faith of the decisions herein set forth, which were and had become part of the law of the land, and particularly the law of this land, were entitled to rely on said decisions and a decree should have been entered in accordance with the decision rendered by this court registering their title.

15. That it is a violation of the Constitution of the United States and the impairment of the obligation of a contract to hold that Lewers and Cooke, Limited, who bought their title relying on the faith of the decision by the Supreme Court of Hawaii rendered in the case of Kapiolani Estate, Limited, v. Atcherley that the decree of Judge Allen rendered November 2, A. D. 1858, was a complete and binding adjudication on the respondent, Mary H. Atcherley, susceptible of being enforced, are not entitled to enforce said decree and register their title in this proceeding.

16. That the courts of equity of the Hawaiian Islands had in 1858, and have had at all times, jurisdiction and authority to declare

the awardee under a land commission award, trustee for the one equitably entitled to the land so awarded under equities existing at the time of the award.

79 17. That under the decision and evidence in this case

David Kalakaua was and his successors in interest are equitably entitled, to the premises in contest here, and that the holder of the legal title under the land commission award held the same as the trustee for him and his successors in interest, who were equitably entitled at all times to demand a conveyance of said title.

18. That Moses Kapaakea Kinimaka and his successor in interest, Mary H. Atcherley, have been guilty of laches and are now estopped to review or set aside the decision made in Equity No. 155 on November 2, A. D. 1858.

Dated, Honolulu, T. H., May 27, A. D. 1908.

(Sig.)

(Sig.)

CASTLE & WITHINGTON,
KINNEY & MARX,

Attorneys for Appellant.

Endorsement: In the Court of Land Registration Territory of Hawaii. In the Matter of Application of Lewers and Cooke, Limited, to Register and Confirm their Title to Land. Notice of Appeal of Lewers & Cooke, Ltd., Petitioners. Filed May 27th 1908, 2-18 P. M. (S.) W. L. Howard, Registrar Court of Land Registration. Petition No. 76. Court of Land Registration. Filed May 27, 1908 2 o'clock 18 Min. P. M. (S.) W. L. Howard. Castle & Withington, Kinney & Marx, Attorneys for Appellant.

Appeal allowed this 27th May 1908.

(S.)

P. L. WEAVER,

Judge Court of Land Registration.

Received copy of notice of appeal as within this 27th May, 1908.

(S.)

(S.)

LYLE A. DICKEY,

E. M. WATSON,

Attorneys for Mary H. Atcherley, Appellant.

(1) The petitioner, Lewers and Cooke, Limited, is a corporation organized and doing business under the laws of the Territory of Hawaii.

(2) The contestant, Mary H. Atcherley, is a native Hawaiian and resident of the Territory of Hawaii.

(3) The petitioner filed a suit in the Court of Land Registration on the 29th day of January, A. D. 1906, in which it claimed title

in fee simple to a tract of land on the corner of Punchbowl and Queen Streets, Honolulu, Territory of Hawaii, described in Land Commission Award No. 129, Lot 1 thereof, containing an area of about 2 acres. Other land was included in the petition, the title to which depends upon other sources and is distinct from the title in controversy.

(4) That portion of the premises described in the petition which lies within the boundaries described in Land Commission Award No. 129 issued to Kinimaka, having an area of 2 acres, became the subject of a contest between the petitioner, claiming the fee simple thereto, and Mary H. Atcherley, contesting its title to said portion of the land described in the petition and claiming title in herself in fee simple.

(5) The Court of Land Registration found that the petitioner was the owner of the fee simple title of the premises in controversy, and a decree for registration was issued; from which decree Mary H. Atcherley appealed to the Supreme Court of the Territory of Hawaii upon questions of law. The Supreme Court reversed the decision of the Court of Land Registration, and thereafter the said Court of Land Registration entered a decree setting aside its former decree and denying registration to the petitioner.

(6) From this second decree the petitioner appealed to the Supreme Court of the Territory of Hawaii.

(7) The value of the premises in controversy is more than \$5,000. The area of the premises described in the petition, including the premises in controversy, is 2.31 acres. The entire premises are valued, for taxation purposes, at \$26,500 for the real property, excluding improvements.

(8) The controversy arose upon the following facts: In April, 1849, a Board of Commissioners to Quiet Title to Real Property awarded the fee simple title of the premises in controversy and other lots to Kinimaka by Land Commission Award No. 129, on which Royal Patent No. 1602 was issued, as follows:

See Appendix A, page 15.

(9) Kinimaka's application before the Commissioners to Quiet Title to Land alleges that he acquired title to the premises in controversy from one Liliha. The Commission awarded the title to Kinimaka on this application.

(10) On December 29, A. D. 1856, David Kalakaua filed a bill in equity, in the court on the Island of Oahu having jurisdiction in such matters, against Kinimaka, the awardee under Land Commission Award No. 129.

In that bill he alleged, in substance, that he was born in 1836, that prior to 1844 he lived with one Kaniu, a chiefess, as her adopted child according to the custom of the country.

That Kaniu was seized of certain rights, hereditary and other in certain named lands, about 13 in number, situate within the kingdom and including that of Onoulimaloo, Molokai, and the apanas (lots) house-lots in Honolulu, described in L. C. A. 129.

That Kaniu died in 1844, leaving her husband, Kinimaka, the respondent, but no issue.

That on the day of her death Kaniu made an oral will, good according to the custom of the country, whereby she appointed the complainant her heir and left to him all her property.

That during the session of the Board of Land Commissioners to Quiet Land Titles, Kinimaka procured to be awarded to himself four of the lands named, including the house-lots in Honolulu. Certain other facts were also set forth by which Kalakaua claimed that Kinimaka held the legal title to the lands in trust for him and a decree was prayed for declaring such trust.

11. Upon the filing of that bill a summons in the ordinary form was issued and served upon Kinimaka. The latter, however, died on January 24, A. D. 1857, without having answered the bill.

12. On March 16, A. D. 1857, under the title of the original suit, Kalakaua filed a suggestion of the death of Kinimaka and of his leaving as heirs by will his three minor children, Kaniu, David Leleo (father of Mary H. Atcherley) and Moses Kapaakea, and 83 prayed that the heirs be made parties to the bill, that a guardian ad litem be appointed for them and that a time be set for the further hearing of the cause. The full record is as follows:

See Appendix B, page 20.

84 13. On March 6, A. D. 1858, Kalakaua filed a petition in probate for proof of Kaniu's oral will and for his appointment as administrator of her estate. At the petitioner's request a guardian ad litem was appointed to represent the three minors in that proceeding, and citation was issued to Pai, widow of Kinimaka, and George E. Beckwith as administrator of the latter's estate and also as guardian ad litem of the minors. Further proceedings having been had, the probate court on May 3 A. D. 1858, gave judgment to the effect that the verbal will was duly proven and that letters testamentary thereon be issued to Kalakaua.

The full record is as follows:

See Appendix C, page 27.

85 14. Upon petition of Pai, filed April 24, A. D. 1858, Richard Armstrong was appointed administrator of the estate of Kinimaka in place of G. E. Beckwith, resigned, and guardian of the persons and property of Kaniu, David Leleo and Kinimaka, the minors.

15. On July 19, A. D. 1858, a bill in equity was filed by Kalakaua averring substantially the same facts as were set forth in the bill of December, 1856, adding, however, an averment of the probate of the will of Kaniu, and praying for similar relief; but of the lands described in the earlier bill a part only, to wit, two house-lots awarded by Land Commission Award No. 129, Royal Patent No. 1602, including the land in controversy and the ahupuaa of Onoulimaloo, L. C. A. 7130, was made the subject of the later one and a taro patch at Kaaleo, Oahu, L. C. A. 7130, not referred to in the first bill was included in the second. The concluding portion of the bill of 1858 read: "And your orator would further represent that the said Kinimaka, at the time of his decease, left a widow, by name Pai, and minor children by name Kaniu, David Leleo and Kinimaka, who by law succeed to the rights of the said Kinimaka,

for which said children R. B. Armstrong, D. D., has been appointed guardian. And your orator, respectfully representing that he can have no remedy in the premises, except in a court of equity, humbly prays that the said Pai and the guardian of the said children, may be summoned to show cause, at such time and place as may be most convenient for your Honorable Court, why it should not be decreed that the lands hereinbefore mentioned of right belong to your orator. And your orator further prays that it may be decreed that the said Kinimaka did, during his lifetime, procure the award, and hold possession of the before mentioned lands, for the use and benefit of your orator, and further that the said R. B. Armstrong, guardian of the said minor children of the said Kinimaka, may be ordered to convey to your orator all the right, title and interest of the said children in the aforesaid lands; and further that the aforesaid Pia, widow as aforesaid of the said Kinimaka, deceased, may be ordered to convey to your orator, all her right, title and interest in the above-enumerated lands. And that such other orders and decrees may be made and passed in the premises, as may pertain to equity and good conscience, and may give relief to your orator in the premises." The process issued required the Marshal to summon "Pai (w) and Richard Armstrong (Guardian of Kaniu, Leleo and Kinimaka, minors) defendants" to appear, etc. The service of this summons was made upon Pai and upon Richard Armstrong.

16. To the bill of 1858 an answer was filed, entitled "The joint and several answers of Pai and Richard Armstrong, Guardians of Kaniu, David Leleo and Kanimaka, minors, Defendants, to the Bill of Complaint of David Kalakaua" and signed "Pai, Richard Armstrong, Guardian of Kaniu, David Leleo, Kinimaka, minors. By Asher B. Bates, their Solicitor." But very little was admitted in this answer. Ignorance was expressed as to the truth of the main averments, and complainant was left to his proof of the same. It was, however, stated by the respondents as their belief that if the awards were wrongfully issued to Kinimaka, they were issued upon testimony produced to the Board of Commissioners to quiet land titles which satisfied that Board that Kinimaka was entitled to such awards.

17. At the trial after evidence taken (on behalf of petitioner) counsel for the respondents presented the view that, assuming that the land originally belonged to Kaniu, and that she attempted to pass it by will to Kalakaua, nevertheless the King, cognizant of these facts, took back at the time of the great division his title to the land and thereafter, through the Board of Land Commissioners, made a redistribution and gave an award covering these lands to Kinimaka and none to David, and that, no appeal having been taken from the award, the latter was final and the complainant was estopped from re-examining the matter. Decision was reserved by the Court.

18. Thereafter, on November 2, A. D. 1858, the complainant filed a discontinuance of his suit except in so far as the same related to the land of Onoulimaloo, Molokai, and Apana 1 of R. P. 1602.

being L. C. A. 129, and on the same day, the final decree was rendered.

19. By that decree it was ordered "that Mr. Armstrong, as Guardian of Kaniu, David Leleo and Kinimaka, minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this cause, the land named Onoulimaloo on the Island of Molokai; and a first apana (lot) of land set forth in Royal Patent No. 1602 filed in this Cause." The full record including the evidence is as follows:

See Appendix D, page 48.

88 20. The actual occupation of the premises from the earliest times is shown to be as follows:

It was shown in the evidence in suit of 1857 that,

David Kalakaua, from some time prior to 1844, lived on the land with his adopted mother, Kaniu. After her death he continued to live on the premises, claiming by virtue of an oral will, afterwards admitted to probate. Kinimaka, the surviving husband of Kaniu, was living there also. He was the natural guardian of the minor, David Kalakaua, who became of age about 1856. From 1857 until about 1870 there is no evidence of the actual occupation of the premises, nor of any change in its occupation. In 1858 (the same year of the decree that the guardian, Richard Armstrong, do convey to David Kalakaua the premises in question) said Richard Armstrong loaned to David Kalakaua \$450 upon the security of a mortgage given by Kalakaua covering the title to the premises in controversy, in which the premises are described as those "granted to said D. Kalakaua by a decree of the Chief Justice of the Supreme Court." In 1858 and 1867 David Kalakaua mortgaged the same premises to other persons. In 1868 D. Kalakaua caused the premises in controversy to be conveyed to his wife, Kapiolani. The testimony in this case shows that Kalakaua and his wife, Kapiolani, occupied the premises as a home from some time prior to 1870 up to 1874, when Kalakaua became King of the Hawaiian Islands, and thereafter he occupied the premises as his private home until he died in 1891. Thereafter Kapiolani occupied the premises until she died in 1898. Since her death the premises have been occupied by her grantees (nephews) David and Jonah Kubio, and those claiming through them. The premises are now in possession of Lewers and Cooke, Limited, petitioner in the Court of Land Registration.

During this time there is no evidence of any adverse occupation or possession of the premises by Kinimaka, or any heirs of

89 Kinimaka or those claiming under them. David Leleo Kinimaka and Moses Kinimaka, sons of Kinimaka, the patentees, lived on the premises some of the time during Kalakaua's reign as Royal guards.

21. The chain of title under which Mary Atcherley claims is as follows:

The original Land Commission Award No. 129, and Royal Patent 1602, based thereon, was issued to Kinimaka. Kinimaka died in 1857 and by his will the premises in controversy descended to

Kaniu Kinimaka, a daughter, for her life, and after her death to David Leleo Kinimaka, a son, for his life, and after his death to Moses Kinimaka, a son, the remainder in fee simple. In 1880 Kaniu conveyed all her interest in the premises to David Leleo Kinimaka and died in 1901. In 1884 David Leleo Kinimaka died, leaving him surviving several minor children; among others, Mary Atcherley, born in 1874. In 1897 Moses K. Kinimaka, the remainder-man conveyed his interest to Mary Atcherley for a consideration of \$50.

22. In 1901 Mary Atcherley brought suit at law in ejectment for the possession of these premises, in the Circuit Court of the First Circuit, Territory of Hawaii, having jurisdiction thereof, against the Kapiolani Estate, Limited, then in possession.

23. This action was enjoined by a complaint and a writ of injunction based thereon issued out of the Circuit Court of the First Circuit, Territory of Hawaii, by a Judge thereof having jurisdiction thereof, in a suit in equity, wherein the Kapiolani Estate, Limited, asked that an injunction issue and that Mary Atcherley be declared to be a trustee for the petitioner, the Kapiolani Estate, Limited.

An Answer was filed by the Defendant, Mary Atcherley.

Thereafter a Stipulation was entered into by the Kapiolani Estate, Limited, and Mary Atcherley, providing in substance that inasmuch as both parties wished to have the question of res judicata under the proceedings in equity set up in a proposed amended Bill of Complaint adjudicated and settled before proceeding further thereby determining whether future litigation between the parties was necessary or not, they agreed, with the consent of the Court, in order to effectuate the premises that the Petitioner might withdraw its bill and file the said proposed Amended Bill; that the Defendant should withdraw her answer and file a general Demurrer to the said Amended Bill of Complaint, setting up that said Bill of Complaint, constituted no cause of action and that the Demurrer should be sustained pro forma and that Plaintiff should appeal from said Decree to the Supreme Court of the Territory.

In accordance with this Stipulation the original Bill and Answer were withdrawn and the said amended Bill filed. This amended Bill sets up in substance the pleading and decree in the equity suit, by Judge Allen in 1858, the proceedings in connection with the probate of the oral Will of Kaniu, and the actual possession of the premises in controversy by Kapiolani Estate, Limited, and their privies in title up to the date of the suit.

The amended bill in full is as follows:

See Appendix E, page 69.

91 In further accordance with this stipulation, a decree was entered sustaining the demurrer and dismissing the bill.

An appeal to the Supreme Court was taken.

On April 7, 1903, a decision was rendered by the Supreme Court of the Territory, wherein the Court said that the main question whether the respondent is bound by the decree of 1858, and recited at length the facts set forth in parts 10 to 20 above, and

facts relative to the Kinimaka family substantially as stated in paragraph 21 hereof.

The Court disposes of the minor question as to service of process in favor of the legality of the service, and then said, referring to the decree of 1858: "The old decree is claimed by respondent to be erroneous, for the further reason that upon the facts and the evidence adduced in that proceeding in 1858 the Court erred in holding that Kinimaka, and after him his heirs, was a trustee of the legal title for the benefit of Kalakaua. The contention of the respondent (Atcherley) is that, because of these two alleged errors last mentioned, to wit, the lack of service and upon the merits, the Court should refuse to enforce the decree. It is not contended that the Court must in all such cases re-examine the former proceedings but merely that it may, in its discretion, do so. Assuming that to be so, we decline to re-try the old case. The guardian appeared and contested the complainant's claim, presenting in opposition substantially the same views now sought to be urged by the respondent. The ward's interests were not permitted to go by default, but were fully defended by counsel. The decree, while not carried out by the execution of a conveyance, was in fact, acquiesced in, as appears by the bill, by all concerned, and the complainant and his successors in interest from that time continuously until about January, 1900, held open, notorious and undisturbed possession of the land. Under the circumstances, and after a lapse of 42 years, we do not think that the court should examine into the merits of the former proceedings or refuse to enforce the decree, for the reasons suggested."

The decision of the Supreme Court including a concurring and a dissenting opinion is in full as follows:

See appendix F, page 99.

93 After this decision the case was remitted to the Circuit Court of the First Circuit and the demurrer was overruled. A second demurrer was filed and overruled and an answer was filed putting in issue the title. The case is still pending in the Circuit Court. At this stage of the litigation, on May 29, 1905, the Kapiolani Estate, Limited, being in possession, as before, for a consideration of \$35,000, conveyed to Lewers and Cooke, Limited, appellant herein, by warranty deed, almost all the premises described in Land Commission Award No. 129, and a lot described in Land Commission Award No. 729, having a total area of 2.31 acres. The improvements on the premises were assessed for \$10,000 in 1906.

In 1906 Lewers and Cooke, Limited, being in possession, brought an action in the Court of Land Registration, naming Mary H. Atcherley as a defendant, who claimed title to certain parts of the premises described (and asking that title be registered in the name of the petitioner.)

The parties then agreed to submit themselves to the jurisdiction of the Court of Land Registration, notwithstanding an equity suit and suit in ejectment pending in the Circuit Court.

94

APPENDIX A.

Number 129, Kinimaka.

He has claimed as his certain premises at Honolulu on the ground that he received these premises in the year 1834, and has had undisturbed possession up to this time.

In these lands we award to Kinimaka a freehold estate less than allodial. Should he pay the government communication, a Patent will be issued to him in fee simple.

But it is proper for him to pay for the hearing and the deciding of the claim. Thus,

For advertising the claim in the newspaper.....	\$1.00
For recording the claim 2 pages.....	1.00
Wm. L. Lee. For the diagram.....	.50
J. H. Smith. For working the 24th day of October 1846	1.00
S. M. Kamakau. For recording the testimony of the witnesses 2 pp	1.50
Z. Kaauwai. For surveying one day.....	2.50
Ioane Ii. For recording50
For deciding the claim April 10, 1849.	2.50
	<hr/>
	10.50

These are the boundaries,
Survey by D. Kalanikahua.

Lot 1.

Survey of a houselot of Kinimaka in Honolulu, Oahu, on the lower side of Makai St. and the south side of Punchbowl St. Beginning the survey at the south corner of the junction of Makai and Punchbowl Streets and running,

S. 68° W. 7 chains $42 \frac{3}{12}$ feet to the upper sides of the fish pond of H. Kalama, adjoining Punchbowl St. turn and run along the upper edge of said pond S. 52° E. 4 chains $50 \frac{2}{12}$ ft. to the West corner, of the lot of Ke adjoining the fish pond; turn N. 47° E. 2 chains 29 ft., turn N. 31° W. and run a little, $23 \frac{9}{12}$ feet, turn N. 47° E. 4 chains $2 \frac{8}{12}$ ft.; all these sides join the house lots of Ke; thence turn to place of beginning.

N. 49° $15'$ W. 1 chain $39 \frac{7}{12}$ ft. Area 2 acres 2 chains 28 fathoms, 15 feet.

Diagram.

95

Lot 2.

Survey of a houselot of Kinimaka situate on the north side of Punchbowl St. and below the lot of Paki, and above the lot of Lota; Beginning the survey on the south corner of the lot of Paki, and the north side of Punchbowl St., the first side lies,

N. $35^{\circ} 30'$ W. 2 chains 45 $\frac{6}{12}$ ft. to the east corner of the
 of C. Kanaina turn S. 53° W. 1 chain 24 $\frac{5}{12}$ ft. to the north
 ner of the lot of Lota; turn S. $14^{\circ} 30'$ E. 2 chains 18 $\frac{6}{12}$ ft. to
 south corner of the lot of Lota; then turn to place of beginning.
 $68^{\circ} 15'$ E. 2 chains 15 $\frac{10}{12}$ ft. Area 545 fathoms 12 feet.

Diagram.

96

Lot 3.

The plan of the house lot of Kinimaka at Honolulu, Oahu, jo
 ing the beach which is makai of the lot of Wahinealii and Wai
 of the lot of Kealoha and Ewa of the lot of Naahu. Beginning
 survey at the south corner of the lot of Kealoha adjoining the bea
 the first side lies,

N. $61^{\circ} 30'$ E. 1 chain 60 $\frac{9}{12}$ feet to the west side of the lot
 Wahinealii; turn, S. $22^{\circ} 30'$ E. 1 chain 21 $\frac{9}{12}$ feet to the so
 corner of the lot of Wahinealii; turn S. $67^{\circ} 30'$ W. 1 chain 53 $\frac{6}{12}$
 feet to the west corner of Naahu adjoining the beach; thence turn
 place of beginning. N. 27° W. 1 chain 9 $\frac{3}{12}$ feet.

Area 278 fathoms 11 feet.

Diagram.

It is proper for him to pay for the hearing and deciding
 claim thus,

For these lots, 2, 3. \$10.

97

Number 1602.

Royal Patent.

Of the King in accordance with the report of the Land Comm
 sioners.

Whereas the Board of Commissioners to Quiet-Land titles
 awarded to Kinimaka by Award No. 129 a freehold estate less th
 allodial in the premises mentioned below, and,

Whereas, Kinimaka has paid into the government treasury eigh
 two and 50/100 Dollars for the government's rights in said land

Therefore by this Royal Patent Kamehameha III, the Great K
 over the Hawaiian Islands by the Grace of the Lord, shows to
 men this day for himself and his kingly successors that he has c
 veys and granted in fee simple to Kinimaka that land at Honol
 on the Island of Oahu with these boundaries.

Lot in Punchbowl St. commencing at the south corner of Qu
 and Punchbowl Streets and running; S. 68° W. 7 chains 42 $\frac{3}{12}$
 feet to the upper side of the fish pond of H. Kalama adjoining Pun
 bown St. thence along the upper edge of said pond; S. 52° E
 chains 50 $\frac{2}{12}$ ft. to the west corner of the lot of Ke; thence N. 4

E. 2 chains 29 ft. N. 31° W. 23 $\frac{9}{12}$ ft. and N. $47\frac{3}{4}^{\circ}$ E. 4 chains 2 $\frac{8}{12}$ ft.; all these sides join the house lot of Ke; thence N. $49\frac{1}{4}^{\circ}$ W. 39 $\frac{7}{12}$ ft. to commencement 2.52 acres.

Lot 2 on Punchbowl St. commence at the south corner of the lot of Paki and north side of Punchbowl St. and run; N. $35\frac{1}{2}^{\circ}$ W. 2 chains 45 $\frac{6}{12}$ ft. to the lot of Kanaina; thence S. 53° W. 1 chain 24 $\frac{5}{12}$ ft. to lot of Lota; thence S. $\frac{1}{4}^{\circ}$ E. 2 chains 15 $\frac{10}{12}$ ft. to place of commencement.

545 fathoms.

98

Lot 3 at Beach.

Commencing at the south corner of the lot of Kealaha adjoining the beach and running N. $61\frac{1}{2}^{\circ}$ E. 1 chain 60 $\frac{9}{12}$ ft. to the west corner of the lot of Washine III, thence S. $22\frac{1}{2}^{\circ}$ E. 1 chain 21 $\frac{9}{12}$ ft. to lot of Noahu; thence S. $67\frac{1}{2}^{\circ}$ W. 1 chain 56 $\frac{6}{12}$ ft. along that lot to beach; thence No. 27° W. 1 chain 9 $\frac{3}{12}$ ft. to place of commencement.

278 fathoms.

Within these lots 3.20 acres more or less. All mineral and metal mines are reserved to the Government. This land is Kinimaka's. It is granted in fee simple to him, his heirs and devisees, subject however, to the tax laid by the legislature from time to time upon fee simple land.

In witness whereof I have put here my name and the great seal of the Hawaiian Islands this 30th day of August 1858.

Name: KAMEHAMEHA.

Name: KEONI ANA.

99

APPENDIX B.

DAVID KALAKAUA

VS.

KINIMAKA.

To the Honorable the Chief Justice of the Hawaiian Islands, Sitting as a Court of Chancery:

Humbly complaining sheweth unto Your Honor, Your Orator, David Kalakaua of Hónolulu, Oahu, Hawaiian Islands as follows:

That he, Your Orator, born on or about the — day of November A. D. 1836, in his early years and prior to the year 1844 lived with one Kaniu, otherwise called Haaheo, a female chief of this Kingdom as her adopted child, according to the then custom of the country being related to the said Kaniu as follows, viz: as the son of Kapaakea and Keohakalole, the great grandson and great grand daughter of Kamakaeheikuli, of which Kamakaeheikuli the said Kaniu was grand daughter. That as Your Orator is informed and believes and therefore avers, the said Kaniu was seized of certain rights hereditary and other, in sundry lands situate within this Kingdom, to wit, in the lands of

Kukuluwaluhia.....	Kohala.....	Hawaii
Peahi.....	Hamakualoa.....	Maui.
Aleamai	Hilo.....	Hawaii
Wainuku	Kau	"
Kahilipali.....	"	"
Ponahawai	Hilo.....	"
Kalaoa	Kona.....	"
½ Keana.....	Koolauloa.....	Oahu.
100 Maihi.....	Kona	Hawaii
Kalaluki	"	"
Onoulimaloo	Molokai.	
½ Keana	Koolauloa.....	Oahu.

and also certain houselots and small divisions of land in and near Honolulu, Oahu, viz: those described in the Award of the Board of Land Commissioners No. 129—confirmed by Royal Patent 1602 which rights as Your Orator is advised by counsel and believed by the law of the land and the custom of the country descended to her heirs.

And Your Orator further showeth that the said Kaniu deceased during or about the year 1844, leaving no issue but a surviving husband Kinimaka by name and although owing to his ten years at that time Your Orator cannot of his own knowledge declare—yet he is informed and believes and therefore avers that all times while in health and prior to her said decease, Kaniu declared her intention to make your Orator her heir and that the day of her decease and in immediate expectation thereof, in the presence of several high chiefs of this Kingdom, to wit of M. Kekuanaoa and others competent witnesses thereto, she solemnly nominate and appoint Your Orator, being then an infant aforesaid to be her heir,—and that then and thereafter, Your Orator was by the then King, Kamehameha III, and by the high chief of the Kingdom, regarded as the lawful heir to the property of Kaniu aforesaid.

And Your Orator further showeth unto Your Honor, that on the said decease of Kaniu, Your Orator being an infant as aforesaid the said Kinimaka assumed the guardianship of the said property and continued to exercise the power of a guardian thereof until the time of the division of lands in the year 1848 when he surrendered the first eight lands above named to the Majesty Kamehameha III retaining the remaining four—whereof four he did or should have received in trust for Your Orator; furthermore, during the Session of the Board of Land Commissioners to quiet Land Titles, the said Kinimaka did enter before said Board the claims to the houselots and small divisions of land aforesaid belonging to the Estate of Kaniu and procure the same to be awarded to himself, which lots and divisions as shown by testimony taken before the said Board, could only be held by the said Kinimaka in trust for the heir of Kaniu, which heir Your Orator claims to be as hereinbefore shown. And your Orator further showeth to Your Honor, that prior to the decease of Kamehameha III

meha III and Abner Paki a high chief and during the minority of Your Orator, the said Kinimaka never disputed or denied the rights of Your Orator in the premises, but on the contrary frequently to Your Orator, and as Your Orator is informed, to others, did expressly declare treat and speak of Your Orator as the adopted child of Kaniu, and the heir to the property aforesaid. Wherefore Your Orator did not then become aware of any intention on the part of the said Kinimaka to defraud and injure Your Orator in the premises. But subsequent to the death of Kamehameha III and of the A. Paki aforesaid, and since Your Orator arrived at legal age the said Kinimaka has pretended that he himself is the heir of Kaniu and sole owner of the said property, has refused to convey the same to Your Orator, and has denied and does still deny Your Orator's rights therein and thereto.

Therefore Your Orator charges that the said Kinimaka well
102 knowing the premises to wit, that Your Orator is heir of Kaniu and of right entitled to the possession and enjoyment of the said property and that he has held the same only in trust for Your Orator has withheld and does withhold the same collusively, fraudulently and with intent to deprive Your Orator of his just rights therein.

Wherefore Your Orator prays the aid of Your Honorable Court that a day and hour may be appointed for the hearing of this his complaint and of the proofs of the matters herein set forth, and that the said Kinimaka may be cited then and there to appear before Your Honorable Court to answer to the matters and things herein contained as fully as if as to each and all of them particularly interrogated, and to show cause if any there be, why the prayer of Your Orator, should not be granted. And that Your Honorable Court will grant such other and further relief in the premises as your Honorable Court may be competent to give and as justice may demand.

And Your Orator will ever pray etc.

DAVID KALAKAUA.

Subscribed and sworn to before me this 29th day of December 1856.

G. M. ROBERTSON,

Acting Chief Justice of the Supreme Court.

Let process issue as prayed for, returnable before the Chief Justice at Chambers, on the 14th day of January 1857.

G. M. ROBERTSON,

Acting Chief Justice.

Endorsed: Filed 30th Dec. '56. Jno. E. Barnard, Clerk Sup. Court.

103 To William C. Parke, Marshall of the Hawaiian Islands,
Greeting:

You are commanded by order of the Honorable William L. Lee, Chief Justice of the Supreme Court, to summon—Kinimaka of —

Defendant, to be and appear before the Honorable William L. Lee aforesaid, at his Chambers in the Court House in the city of Honolulu, Island of Oahu, on Wednesday the fourteenth day of January—next, at ten o'clock A. M. to show cause why the prayer of David Kalakaua Complainant—should not be granted, pursuant to the tenor of his bill of Complaint hereto annexed.

And have you then and there this Writ, with full return of your proceedings thereon.

Witness, The Honorable William L. Lee, Chief Justice of the Supreme Court, at Honolulu—this 30th day of December A. D. 1856

[SEAL.]

JNO. E. BARNARD,

Clerk Supreme Court.

Served the within Summons on the within named persons by leaving a certified copy of the same in *his* possession, this 31st day of December A. D. 1856.

N. C. PARKE, *Marshal.*

Endorsed: Supreme Court, (In Equity.) David Kalakaua vs Kinimaka. Petition & Summons. 30th Dec'r 1856.

104

In re DAVID KALAKAUA

vs.

KINIMAKA.

To the Honorable G. M. Robertson, Acting Chief Justice and Chancellor of the Hawaiian Islands:

The Orator in the above entitled cause by the Undersigned His Attorney, respectfully suggests to Your Honor, that on or about the 24th day of January last, the above named, Respondent deceased, after service of Your Orator's Petition and before answer filed leaving as heirs by will his three minor children Kaniu, D. Leleo & Moses Kapaakea, which said will has been duly admitted to Probate—and Your Orator further suggests that the said heirs are the legal representatives and successors of the Respondent, aforesaid, in the Trust in certain Real Estate charged in the Bill filed in this cause to exist in favor of Your Orator.

Wherefore the said Orator prays that the said heirs may be made parties to the said Bill, and that a guardian ad litem may be appointed for them by Your Honorable Court. And that Your Honor will be pleased to appoint a day and hour for the further hearing of this cause.

And your Orator will ever pray &c.

JAS. W. MARSH,

Att'y for Kalakaua, Orator.

Honolulu, March 16th, 1857.

Endorsed: Supreme Court (In Equity)—David Kalakaua vs Kinimaka. Petition for the appointment of a Guardian ad litem Filed 19th March 1857. Jno. E. Barnard, Clerk Supreme Court.

105

Endorsed: E. 155. Supreme Court. David Kalakaua vs Kinimaka. Records. 1857.

106

APPENDIX C.

Estate of Kaniu, Prob. 1770.

Supreme Court. At Chambers.

24th April, 1858.

In the Matter of the Estate of L. H. KANIU, Dec'd.

Before G. M. Robertson, Associate Justice.

Mr. Harris for the Applicant made his argument to the Court.

Mr. Davis, for the widow and heirs of Kinimaka.

The Court took time to consider of the case.

Endorsed: Supreme Court—In the Matter of the Estate of L. H. Kaniu, deceased. Proceedings. 24th April 1858.

107

Estate of Kaniu, Prob. 1770.

Supreme Court.

In the Matter of the Estate of L. H. KANIU, Deceased.

Decision of the Hon. G. M. Robertson.

My Judgment is that the verbal will of L. H. Kaniu made in the year 1843, by which she bequeathed all her property to David Kalakaua, is duly proven, and that letters testamentary thereon, with copy of this Judgment annexed, be issued to him, the said David Kalakaua.

(Sg.)

G. M. ROBERTSON,
Associate Justice of the Supreme Court.

Honolulu 3 May 1858.

108 To all persons to whom these presents shall come:

Be it known, that I, G. M. Robertson, Associate Justice of the Supreme Court of Law and Equity for the Hawaiian Islands, by virtue of the powers vested in me, do hereby grant these letters testamentary, with copy of Judgment annexed, to David Kalakaua, upon the Will of L. H. Kaniu late of Honolulu, in the Island of Oahu, deceased. And I do hereby give him the aforesaid David Kalakaua all the necessary powers of administering upon all the rights, credits and effects, real and personal, of the said L. H. Kaniu, of Honolulu, Oahu, deceased, and of collecting and settling all debts due to or owing by said Estate, and all persons are hereby commanded to respect this his authority.

Given under my hand and the seal of this Court at Honolulu this 3rd day of May A. D. 1858.

(Signed)

G. M. ROBERTSON,

Associate Justice of the Supreme Court.

P. 1770.

Endorsed: Supreme Court. In the Matter of the Estate of L. H. Kaniu deceased. Letters Testamentary with copy of Judgment annexed. 3 May, 1858.

109

Est. of Kaniu, Prob. 1770.

Supreme Court.

In Probate. At Chambers.

In the Matter of the Estate of L. H. KANIU, Deceased.

Before Associate Justice Robertson.

The petitioner, David Kalakaua, sets forth in his petition, that L. H. Kaniu, a female Chief of this Kingdom, deceased at Honolulu in the year 1843; that he was the adopted son of the deceased, and grandson of her brother; and that at the time of her death she was possessed of a considerable amount of real property, which she bequeathed verbally in accordance with ancient usage, to the petitioner, directing her husband, the late Kinimaka, to take care of the said property for the benefit of the petitioner, who was then an infant, and he now prays to be permitted to prove such verbal will of Kaniu, and that letters of administration on her estate may be granted to him.

Citation was issued to Pai the widow of Kinimaka, and to the guardian ad litem of his minor heirs, to appear and contest this application.

It was admitted at the hearing, by Counsel for the heirs of Kinimaka, that up to the year 1844, the chiefs, by the custom of the country, were in the habit of passing their estates by verbal wills, with the knowledge and approval of the King and Premier, and that such wills were recognized by the authorities as binding and operative, and that coverture did not affect the right to make a will.

Nauhele, formerly a member of Kaniu's family, testified in substance, that Kaniu died in Honolulu, in the year 1843, leaving a husband, Kinimaka, who died last year; that Kaniu had no child of her own; that at the time of her death she was possessed of real estate on Hawaii, on Molokai, in Honolulu, and in Lahaina, that the petitioner's grandfather Aikanaka, and Kalailua, the mother of Kaniu, were brother and sister; that Kaniu, a few days previous to her death, bequeathed all her property verbally, to the petitioner, in presence of Governor Kekuanaoa, Kahina the witness and others; and that at the great division of lands

in 1848, Kinimaka went before the King and divided the lands left by Kaniu, as in his own right.

M. Kekuanaoa testified, in effect, that a short time previous to her death, Kaniu sent for him to hear what she had to say respecting the disposition of her property; that he was at that time Governor of this Island, and Judge of the Court of Oahu, and that it was usual in those times for persons who were dying to send for him that he might hear, as Agent for the King, what they had to say in relation to the disposal of their property; that he asked Kaniu, in presence of her husband "who do you wish to be your heir?" when she replied that David Kalakaua was to be heir to all her property; that he suggested to her the propriety of leaving the property in the hands of Kinimaka until David should become of age, to which she assented, and that he understood Kinimaka to agree at that time to this disposition of the property; that immediately after Kaniu's death, Kinimaka went to Lahaina to inform the King and Premier, while the witness, at the same time, wrote to the Premier notifying her that Kaniu had disposed of her property in the manner before stated; that he received a letter from the Premier, in reply, stating that the King had given all the property to Kinimaka, which the witness afterwards told the Premier was not in accordance with the will of Kaniu to which she replied, "well, the King has done it"; that Kaniu was of higher rank than her husband who was but a petty chief; that she had told the witness some time before she made her will that she had adopted David Kalakaua, and that he thinks this was antecedent to the enactment of any statute regarding the adoption of children.

Charles Kanaina, testified in substance that at the time Kaniu died he was at Lahaina with his wife M. Kekauluohi, who was at that time the Premier of the Kingdom; remembered that Kinimaka came to Lahaina, and in the presence of witness and several other chiefs, informed the Premier that Kaniu was dead, and that she had bequeathed her property to the petitioner, to which the Premier replied, "that is good, if you and your wife agreed to do so, it is right the property should go to the moopuna"; that the Premier at the same time received a letter from the Governor of Oahu, informing her to the same effect; and that a short time afterwards, Kinimaka told the witness, in Honolulu, that he was to have charge of the property during his lifetime, and after that David was to have it.

Per Curiam:

Upon the facts of this case, as they appear from the evidence adduced I am of the opinion that the application of David Kalakaua must be sustained. I think there can be no reasonable doubt that Kaniu, a short time before her death, made and declared a verbal will, by which she bequeathed all her separate property, both real and personal, to the petitioner, giving directions, at the same time, that her husband, Kinimaka, should hold and take charge of the property for the heir, until he should become of age. As to the validity, in law, of such a verbal will, made and published according to the custom of the country, at any time ante-

cedent to the enactment of the Organic Laws, in the year 1846, I have no doubt, chiefs and others possessed of property, were
 112 in the habit, in those days, of passing their estates in that manner and their verbal will- were recognized as binding and operative to all intents and purposes.

It may be objected in the present case, that the petitioner has failed to show that the King and Premier approved the will of Kaniu, in his favor, and that, therefore, it ought not to be held valid. But this objection, it seems to me, cannot be regarded as a sound one, because the King, I think, had not the power, under the circumstances, even if he had so intended, which does not seem clear, to annul the will of Kaniu, and substitute Kinimaka as her heir, in the place of David Kalakaua, whom she had expressly nominated. Nothing but some strong legal objection could have justified the annulment of the will. It was made subsequently to the adoption of the old Constitution, which guaranteed protection, alike for chiefs and common people, in their lives, liberty and property. The law which regulated the descent of lands to heirs, at the time of Kaniu's death, was approved at Lahaina, on the ninth day of November 1840. According to the provisions of that law, it does not appear to me that the express approval of the King and Premier, was necessary to validate the will of Kaniu. The language of the English version of the Statute is as follows: "Be it furthermore enacted in relation to lands which Kamehameha 1st, and Kamehameha 2nd. gave to land agents, that after the publication of this law respecting taxation, whenever any of those land Agents dies, his heir shall render an account to His Majesty the King of the lands which belonged to the deceased, and these shall return one-third of those lands to the King. According to this rule, all the lands, whether few or many of every man who dies shall be divided. But if two months elapse after the death of any person, and the heir neither present himself before the King nor sent a written notice, then the
 113 lands of the heir shall be divided thus, when the King is not notified." "From this time forth, the King and his Premier must be informed of all bequests of lands, and whatever Estates to the heirs" (See Old Laws pp. 47 and 48, Article 14).

Nothing is said in this statute of the approval of will, by the King and Premier, but, simply, that they should be duly notified without delay. This provision was fully complied with in the present instance, by the official notification of the Premier by the Governor of Oahu, and the verbal report of Kinimaka.

Again, it may be objected further, that it would not be safe, after the lapse of so great a length of time, to allow a nuncupative will, the terms of which are not shown to have been reduced to writing within a reasonable time after the death of the testator, to be proved solely by the oral testimony of witnesses whose recollection of particular facts, at so great a distance, may have become indistinct and unreliable, and that the petitioner or his relatives, ought to have taken steps to assert his alleged rights at an earlier day. To these objections it is answered that Governor Kekuanaoa has given some

testimony to show that the terms of Kaniu's will were reduced to writing, about the time she declared it verbally in his presence, and that the writing was then in the possession of Kinimaka; and that the petitioner, who only became of age about *to* sixteen months ago, did as soon as was convenient thereafter, commence proceedings for the recovery of the property bequeathed to him by Kaniu, which proceedings abated by the death of Kinimaka.

It appears to me that the position of the several witnesses who have testified, at the time when Kaniu's death took place, and the means of knowledge which they consequently possessed, were such as to add greatly to the credibility of their testimony, and, in the absence of any statute limiting the time within which a will
114 may be proved, I think the Court would not be justified, notwithstanding the lapse of so long a period of time in rejecting, even a verbal will, made in accordance with the laws of the lands as it then stood, the proof of which is so clear.

My Judgment is that the verbal will of L. H. Kaniu, made in the year 1843, by which she bequeathed all her property to David Kalakaua, is hereby proven, and that letters testamentary thereon, with copy of this judgment annexed, be issued to him, the said David Kalakaua.

Honolulu 3 May, 1858.

Endorsed: Supreme Court. In the Matter of the Estate of L. H. Kaniu deceased. Decision of Judge Robertson. 3 May 1858.

115 Est. Kaniu, Prob. 1770.

Supreme Court. At Chambers.

26th Feb'y, 1858.

Before Hon. G. M. Robertson, Associate Justice.

In the Matter of the Estate of LILIA H. KANIU, of Honolulu, Deceased.

David Kalakaua appeared in Support of his application for Letters of Administration.

M. KEKUANA'OA, sworn, says:

I know Kaniu in her lifetime, she resided in Honolulu she died in Honolulu in the year 1843. She left a hu band whose name was Kinimaka. He died during last year. Kaniu left no child. She died intestate. I can't state whether she left property or not of her own. The applicant, David Kalakaua is a distant relative to Kaniu, through his mother Keohokalole. I don't know of any near relative of the deceased now alive. A short time previous to her death I went to visit her in company with her husband she appeared to be quite weak and failing, & I asked her in case of her death who would be her heir, she replied that David Kalakaua would be her

heir. Her husband who was present gave his consent thereto. She said she intended all her lands and separate property to go to David Kalakaua. I said to her you had better leave this property in charge of your husband to take care of for him and she said "yes that's very good."

NAUHELE, sworn, says:

116 I was acquainted with Kaniu. She died in Honolulu, think in the year 1843 leaving a husband whose name was Kinimaka. He died some time last year. Kaniu left no child of her own. She left several lands at Honouliuli on Molokai, Kapalaui on Hawaii, she also left a kale patch near Honolulu, in the Ili o Kaaleo, Two house lots on the East side of Honolulu. That is all the property that I know of. She left also a house lot at Lahaina. The applicant's Grandfather and Kaniu's mother were brother and sister. David Grandfather's name was Aikanaka and the mother of Deceased was Kalailua. Kaniu made no written will. A few days previous to her death she willed all her property verbally to David Kahina who is now present was present at the time she made that verbal declaration. Kekuanaoa & myself were present also and several others who are now dead. Keohokalole who is now alive is the daughter of Kaniu's brother, Aikanaka.

Postponed for one week.

JNO. E. BARNARD,
Clerk Supreme Court.

P. 1770.

Endorsed: Supreme Court. In the matter of the Estate of Liliuokalani H. Kaniu deceased. Proceedings. 26 Feb'y, 1858.

117

Probate 1770.

Supreme Court. At Chambers.

April 1, 1858.

In the Matter of the Estate of L. H. KANIU, Deceased.

Before the Hon. G. M. Robertson, Associate Justice.

Parties appeared pursuant to adjournment.

M. KEKUANAOKA, Sworn, Says:

I knew Kaniu. I was present at the time she died. Previous to her death she sent for me to come to see her. I asked what she wished, she replied that she thought she was dying and wished the Governor to hear what she had to say. I was at the time Judge of the Court at Oahu and also Governor of the Island. I asked her "who do you wish to be your heir?" She replied "that David Kalakaua was to be heir to all her property. she had taken David Kalakaua, who was then an infant and adopted him according to

the custom at that time," Kaniu was of higher rank than her husband who was a petty chief. Kinimaka was present at that time. I said to her that she had better leave the property in the hands of Kanimaka until David became of age. She assented to that. I understood Kinimaka to agree to the proposal at the time—it was usual for parties who were dying to send for me in those times that I might hear what they had to say relating to their property as agent for the King. Kaniu did not notify me that she had adopted David Kalakaua—she had stated so to me before that time. I think the law relating to the adoption of children had not been enacted at the time she informed me of having adopted David. I remember that Kanimaka went to Lahaina to inform the premier and I at the same time wrote to the Premier informing her that Kaniu was dead and that she had willed her property to David Kalakaua. Kinimaka to take charge of it till David came of age. I received a letter from the Premier afterwards informing me that the King had given all the property to Kinimaka himself. When I met the Premier I told her that it was not in accordance with the will of Kaniu and she replied "Well the King had done it—Kaniu stated that the paper which I saw expressed her will in the same way that she had expressed it verbally. I did not see her sign the paper but she told me that she had signed it—she may have lived a week after this. I did not visit her house again between the time of this conversation and her death.

KANAINA, SWORN, says:

I know Kaniu and her husband Kinimaka. I was at Lahaina when Kaniu died. Kokauluohi the late Premier was my wife. I remember that Kinimaka came up to Lahaina to inform the Premier of the death of Kaniu. Kinimaka informed the Premier in my presence and in the presence of several other chief that Kaniu had left her property to David Kalakaua. Kokauluohi said "that is good if you and your wife agreed to do so it is right the property should go to the Moopuna." I never heard any conversation between Kinimaka and the King respecting this subject, but suppose the King heard of it. I never heard whether the King approved of it or not—the Premier received a letter from the Governor of Oahu informing her of Kaniu's death and that she had left her property to David Kalakaua. Kinimaka told me that Kaniu said the property was to be in his charge for his life time and afterwards to go to David Kalakaua; this conversation took place shortly after Kaniu's death. I cannot state what year Kaniu died.

The Court postponed the further hearing of this case until 24 inst.

WILL'M HUMPHREYS,

Ass't Clerk.

Endorsed: P. 1770. Supreme Court. In the Matter of the Estate of L. H. Kaniu deceased. Proceedings. 1 April 1858.

Supreme Court. At Chambers.

17 March, 1858.

In the Matter of the Estate of L. H. KANIU, Deceased.

Before the Hon. G. M. Robertson, Associate Justice.

Petition of D. Kalakaua for Letters of Administration & appointment of guardian ad litem to Minor children.

Mr. Harris appeared for D. Kalakaua. Mr. Bates appeared for the Guardian appointed by the Court on the 9th of March.

Mr. Bates admitted that Kalakaua was not 20 years of age when he commenced these proceedings, had no objection to their taking out Letters of Administration.

Mr. Harris moved the evidence of the 26 Feb'y on appl'n made by Kalakaua to Judge Andrews on this same issue may be read and received on the present hearing.

Motion granted.

Mr. Harris moved that verbal wills being admitted under the old custom this should be read. It was admitted that up to the year 1844 the chiefs by the custom of the country were in the habit of passing their Estates by verbal wills with the knowledge & consent of the King, and that such wills were recognized by the authorities binding & operating and that coverture did not affect the right to make a will.

NAUHELE, Sworn Says:—

I was acquainted with Kaniu when she was alive. I was present when she died. I heard her make a declaration regarding *his* property. After the death of Kaniu I continued to live with Kinimaka, the husband of Kaniu. In 1848 at the time of the great division of land Kinimaka went before the King & claimed the land of Kaniu for himself because the words of the deceased had been left without being fulfilled and in a state of uncertainty on account of the youth of David. I went with Kinimaka myself. The King said part of the land should be set apart for the government and part for Kinimaka—that was in accordance with Kinimaka's request. When Gov. Kekuanaoa arrived at the house. Kaniu said to him in presence of her husband I have sent for you and now declare to you who is to be my heir, our grand child to be the heir of all my property from Hawaii to Kauai and everything that belongs to me, the Gov. said to her that David was very young and unable to take care of the property therefore you had better let Kinimaka have the property till David grows up. Kaniu declined this proposition to consider the property any one's but David's—but wished it to be his at once and requested the governor to take care of it but he said Kinimaka should take care of it till he died. I don't know if the King knew anything about this will at that time. he might have known of it afterwards.

KAHINA, sworn, says:

I lived with Kinimaka—from the time I was a small boy. I have heard Kinimaka spoke of it but was never present at any conversation between the King and Kinimaka with regard to it.

The Court adjourned this case until Wednesday the 24th instant for the production of further evidence.

WILLIAM HUMPHREYS,
Clerk Supreme Court pro Tem.

122

Probate 1770.

Supreme Court. At Chambers.

24th March, 1858.

In the Matter of the Estate of L. H. KANIU, Deceased.

Before the Honorable Elisha H. Allen, Chief Justice.

Parties appeared pursuant to adjournment from the 17th current.

As Justice Robertson was out of town, he having heard the former evidence in this case, the Court adjourned the further hearing until the 31st inst.

WILLIAM HUMPHREYS,
Clerk Sup. Court pro Tem.

123

Probate 1770.

To W. C. Parke, Marshal of the Hawaiian Islands, Greeting:

You are hereby commanded to cite George E. Beckwith, Esqr., Administrator upon the Estate of Kinimaka and Guardian ad litem of the Minor children of the said Kinimaka, and Pae his widow to be and appear at the Court House of the Town of Honolulu to show cause, if any they have, why Letters of Administration may not issue to David Kalakaua, upon the Estate of Kaniu deceased, in accordance with the prayer of his petition to that effect; on the 17th day of March inst. at Nine o'clock, A. M. which suit is then and there to be tried. Hereof fails not at your peril, and make due return of your process, with your proceedings thereon.

Witness, The Honorable Elisha H. Allen, Chief Justice of the Supreme Court, at Honolulu, the 9 day of March A. D. 1858.

[SEAL.]

WILLIAM HUMPHREYS,
Clerk Sup. Court pro Tem.

Served the Citation on the within mentioned person by leaving a certified copy of the same at his usual place of abode this 9th day of March A. D. 1858.

W. C. PARKE,
Marshal of the Hawaiian Islands.

Endorsed: P. 1770. Supreme Court. In the matter of Petition of D. Kalakaua for Letters of Administration on the Estate of Kaniu & appointment of Guardian to the Minor children of Kinimaka. Citation.

Fees Service.....	\$5.
Copy	1.50
	<hr/>
	\$6.50

9 March 1858.

124

Prob. 1770.

In Probate.

OAHU, 88:

To the Honbl. G. M. Robertson, Associate Justice of the Supreme Court:

The undersigned David Kalakaua respectfully makes known to Your Honor that one Kaniu, a native chiefess of this country, ceased about the year 1843 at Honolulu and in accordance with the then usage of this country verbally bequeathed all her property to your petitioner who was her adopted son, and grandson to the brother of the deceased, directing her husband, one Kinimaka, to take care of her said property—for the benefit of the petitioner. And your petitioner further represents that at the time of the decease of the said Kaniu she was possessed of and entitled to a large amount of real property in this Kingdom.

Wherefore your petitioner prays that he may be permitted to prove the will and testament of the deceased as aforesaid, and the relationship to the deceased. And that Letters of Administration upon the estate of the said Kaniu may be granted to him the undersigned. And your petitioner further prays that George E. B. with Esqr. Administrator of the Estate of Kinimaka, which Kinimaka was the husband of Kaniu and is now deceased, and the widow of the said Kinimaka, may be cited to show cause, if any there be, why letters of administration may not issue to the undersigned as prayed.

And your petitioner further prays that a guardian ad litem may be appointed for the minor children of the said Kinimaka and the said children may be cited by their said guardian, to show cause why Letters should not issue as aforesaid.

Your petitioner is advised and believes that the said Minor children are three in number, Kaniu, D. Leleo & M. Kapaakea.

And your petitioner as in duty bound will ever pray, etc.
Honolulu, Oahu, Mch. 6th, 1858.

CHAS. C. HARRIS,
Attorney for David Kapaakea Kalakaua

Subscribed and sworn to before me this 8th day of March, 1858.

WILLIAM HUMPHREYS,
Clerk Supreme Court pro Tem.

Endorsed: P. 1770. Supreme Court. In the matter of the Estate of L. H. Kaniu and appointment of guardian to the minor children of Kinimaka. Petition of David Kalakaua. Filed 8 March, 1858.

126

Probate 1770.

Supreme Court. At Chambers.

March 9, 1858.

Before the Hon. G. M. Robertson.

In the Matter of the Estate of L. H. KANIU, Deceased, and the Appointment of a Guardian for the Minor Children of Kinimaka.

Upon reading and filing the Petition of David Kalakaua for Letters of Administration upon the Estate of Kaniu deceased, and the appointment of a Guardian ad litem for the Minor children of Kinimaka.

The Court did order that George E. Beckwith, the Administrator upon the Estate of Kinimaka, deceased, be appointed Guardian ad litem of the three minor children of Kinimaka, Kaniu, D. Leleo and Moses Kapaakea.

WILLIAM HUMPHREYS,
Clerk Sup. Court pro Tem.

Endorsed: P. 1770. Supreme Court—In the matter of the Estate of Kaniu and appointment of a Guardian for the Minor children of Kinimaka. Proceedings. 9 March, 1858.

127

APPENDIX D.

In Equity.

To the Honorable E. H. Allen, Chief Justice of the Supreme Court of Law and Equity of the Hawaiian Islands:

The undersigned, your Orator, respectfully represents and gives this Honorable Court to understand that one Kaniu, a native Chiefess of this country, deceased at Honolulu, Island of Oahu during or about the year 1843, having declared by her last will and testament your Orator, to be her heir, and directed that her property should become the property of the Orator, that your orator was at that time, to wit: at the time of the decease of the said Kaniu, an infant. Your Orator having been born, as he is informed and believes, on the 16th day of November A. D. 1836.

That the aforesaid Kaniu, at the time of her said decease, directed her Husband, one Kinimaka to manage the property—thus bequeathed, to your orator, for his—your Orator's benefit, during your Orator's infancy. That however—your Orator, on coming of age, discovered that the said Kinimaka, whilst acting as guardian, as aforesaid, had procured the award of the Land belonging to the said Kaniu, during her lifetime to be wrongfully and fraudulently issued, in his own the said Kinimaka's name; that the said Kinimaka deceased in the month of January 1857, without having conveyed the titles of the property to your Orator.

And your Orator further makes known to your Honbl. Court that on the 3rd day of May, this present year, your Orator duly proved the will of the said Kanui at a Court of Probate duly held, on the said day, before the Hon'bl- Associate Justice G. M. Robertson, the certificate of which said Probate, is hereto annexed.

And your Orator further makes known to your Honbl. Court that the land- bequeathed to him by the said Kaniu are two House lots in the City of Honolulu. Awarded by Land Commission Award No. 129 confirmed by Royal Patent 1602—And an Ahupuaa of land situated in the Island of Molokai, called Onou limaloo and awarded by Land Commission Award No. 7130, with a Kalo patch at Kaaleo—Island of Oahu, as per award No. 7130.

And Your Orator further makes known to your Honorable Court that the title of the said land was at the time of the decease of the said Kinimaka, in the said Kinimaka, in trust for, and for the use and benefit of Your Orator.

That Your Orator is the grand Nephew of the deceased Kaniu, and was her adopted child—as your Orator is informed and believes, and therefore swears—Your Orator is advised by counsel that at the time of the decease of the said Kaniu his said ancestress, she was competent by the law and custom of this Kingdom, to make a will, and that her said will would, pass the said property to and vest the same in Your Orator, or in the aforesaid Kinimaka for his, Your Orator's use and benefit.

And Your Orator would further represent that the procuring of the said Award to be made in his own name, by the said Kinimaka was contrary to Equity and good conscience. And your Orator would further represent that the said Kinimaka, at the time of his decease, left a widow by name Pai—and minor children by name Kaniu, David Leleo and Kinimaka, who succeed to the right of the said Kinimaka, for which said children—R. B. Armstrong, D. D., has been appointed Guardian.

And Your Orator, respectfully representing that he can
129 have no remedy in the premises, except in a Court of Equity, humbly prays that the said Pai and the Guardian of the said children, may be summoned to show cause, at such time and place as may be most convenient for Your Honbl. Court—why it should not be decreed that the lands, hereinbefore mentioned of right belong to your Orator.

And Your Orator further prays that it may be decreed, that the said Kinimaka did, during his lifetime, procure the awards and hold

possession of the before mentioned lands, for the use and benefit of Your Orator, And further that the said R. B. Armstrong Guardian of the said Minor children of the said Kinimaka—may be ordered to convey to Your Orator all the right, title and interest of the said children in the aforesaid lands: and further that the aforesaid Pai, widow as aforesaid of the said Kinimaka, deceased, may be ordered to convey to your Orator, all her right, title and interest in and to the above enumerated lands. And that all such other orders and decrees may be made and passed in the premises, as may pertain to Equity and good conscience, and may give relief to Your Orator in the premises.

And Your Orator as in duty bound will ever pray, etc.

Honolulu, Oahu, July 19th, A. D. 1858.

DAVID KALAKAUA.

Charles C. Harris for and in behalf of David Kalakaua to me well known, being duly sworn, depose and saith that the facts herein above set forth are true.

CHAS. C. HARRIS.

Subscribed and sworn to before me this 19th day of July A. D. 1858.

JNO. E. BARNARD,
Clerk Supreme Court.

130 Let *proven* issue as prayed for returnable before me at my Chambers on the 23rd day of July 1858.

ELISHA H. ALLEN,
Chief Justice of the Supreme Court.

131 *Letters Testamentary.*

To all persons to whom these presents shall come:

Be it known that I, H. M. Robertson, Associate Justice of the Supreme Court of Law and Equity for the Hawaiian Islands by virtue of the powers vested in me do hereby grant these letters testamentary, with copy of Judgment annexed, to David Kalakaua, upon the will of L. H. Kaniu, late of Honolulu, in the Island of Oahu, deceased; And I do hereby give him, the aforesaid David Kalakaua, all the necessary powers of administering upon all the rights, credits and effects, real and personal, of the said L. H. Kaniu, of Honolulu, Oahu, deceased, and of collecting and settling all debts due to, or owing by said Estate, and all persons are hereby commanded to respect this his authority.

Given under my hand and the seal of this Court, at Honolulu, this 3rd day of May A. D. 1858.

[L. SEAL.]

(Signed) G. M. ROBERTSON,
Associate Justice of the Supreme Court.

In the Matter of the Estate of L. H. KANIU, Deceased.

Judgment.

My judgment is that the verbal will of L. H. Kaniu, made in the year 1843, by which she bequeathed all her property to David Kalakaua, is duly proven, and that letters testamentary thereon, with copy of this judgment annexed, be issued to him, the said David Kalakaua.

(Signed)

G. M. ROBERTSON,

Associate Justice of the Supreme Court.

Honolulu, 3rd March, 1858.

HONOLULU, *Oahu:*

I hereby certify that the foregoing are true and faithful copies of the original documents now on file in the office of the Supreme Court.

As witness my hand and the Seal of the Supreme Court at Honolulu, Oahu, this 20th day of July A. D. 1858.

JNO. E. BARNARD,

Clerk Supreme Court.

Endorsed: Supreme Court—David Kalakaua vs. Pai, Richard Armstrong, Guardian of Kaniu, David Leleo and Kinimaka—Petition.

133 To W. C. Parke, Esq're, Marshall of the Hawaiian Islands,
Greeting:

Elisha H. Allen

You are commanded by order of the Honorable [William L. Lee],* Chief Justice of the Supreme Court, to summon Pai (w), and Rich-

Kinimaka

ard Armstrong (Guardian of Kaniu, David Leleo and [Kamaka]* Defendants, [in case shall file written answer within twenty days after service thereof]* to be and appear before the Honorable

Elisha H. Allen aforesaid

[William L. Lee aforesaid]* at his Chambers in the Court House in the city of Honolulu, Island of Oahu, on Friday the Twenty third day of July instant [next],* at ten o'clock A. M. to show cause why the prayer of David Kalakaua of Honolulu, Complainant, should not be granted pursuant to the tenor of his bill of complaint hereto annexed.

And have you then and there this Writ, with full return of your proceedings thereon.

Elisha H. Allen

Witness, The Honorable [William L. Lee]* Chief Justice of the Supreme Court, at Honolulu this 20th day of July A. D. 1858.

[SEAL.]

JNO. E. BARNARD,

Clerk Supreme Court.

[* Words enclosed in brackets erased in copy.]

Served the within Summons and annexed petition on the within mentioned R. Armstrong by leaving a certified copy of the same with A. B. Bates the Attorney of R. Armstrong this 21st day of July A. D. 1858.

Served the within Summons and annexed petition on the within mentioned Pai by leaving a certified copy of the same at her usual place of abode with a member of her family. the within mentioned Pai being absent at Hawaii this 21st day of July A. D. 1858.

W. C. PARKE,

Marshall of the Hawaiian Islands.

134 Endorsed: Supreme Court (In Equity). David Kalakaua
vs. Richard Armstrong, Guardian &c. Petition and Citation.

Fees.

2 copies petition.....	6.00
2 " Summons	3.00
2 Services	10.00

\$19.00

20 July, 1858.

135 Before the Chief Justice of the Supreme Court. In Equity.

PAI & RICHARD ARMSTRONG, Guardians of Kaniu, David Leleo, &
Kinimaka, Minors,

vs.

DAVID KALAKAUA.

The Joint & Several Answers of Pai & Richard Armstrong, Guardians of Kaniu, David Leleo, & Kinimaka, Minors, Defendants, to the Bill of Complaint of David Kalakaua.

These Defendants now & at all times hereafter saving & reserving unto themselves all benefit & advantage of exception, to the said Bill of Complaint for answer thereto saith, they know not & have not been informed except by the complainant's Bill & can not admit or deny but that Kaniu, a native Chiefess did deceased in or about the year 1843 having declared by her last Will & Testament that the complainant was to be her heir & that her property was to become his property, nor that the said complainant was a minor, nor that the said Kaniu at the time of her decease directed her husband to manage the property that had belonged to her as the property of the complainant during his infancy & leave the complainant to make proof thereof.

These Defendants further answering say they are ignorant & can not state whether Kinimaka wrongfully & fraudulently procured awards to be issued in his own name, of the land formerly belonging to Kaniu, but they state it as their belief, that if the awards have wrongfully been issued to the said Kinimaka, the same were issued

136 upon testimony produced to the Board of Commissioners to quiet land titles, which satisfied that Board that the said Kinimaka was entitled to such award.

These defendants admit Kinimaka's deceased in the month of January 1857 without having conveyed the title of the property to the complainant & aver that he was never requested so to do during her life time as they verily believe.

These Defendants further admit that on the 3rd day of May in this year the complainant did prove the will of Kaniu as alleged in Complainant's Bill of Complaint, but they aver they have no knowledge & can neither admit or deny that this property bequeathed to the complainant by Kaniu by said Will are the Lots or premises awarded by the said Board of Commissioners to quiet land titles to Kinimaka in Award numbered 1602 7130 but leave the Complainant to prove his allegations in relation thereto.

And these Defendants further answering say they are ignorant & can not admit or deny the allegations of the Complainant that the title vested in the said Kinimaka by aforesaid awards were in trust for the use & benefit of the complainant but leave the complainant to make proof of the allegations in that behalf.

And these Defendants further answering say that they are not skilled in the Law & have no opinion in relation to the will of Kaniu & leave it for the Court to adjudge upon the facts that may come to its knowledge whether by the said Will the said property hereinafter set forth was vested in the complainant or the aforesaid Kinimaka for his use & benefit, but they aver as far as they have any knowledge that the statement that the said Kinimaka procured an Award to be made in his name contrary to equity & good conscience.

And these Defendants further admit that at the time of Kinimaka's decease he left Widow by the name of Pai & minor
137 children by the names of Kaniu, David Leleo & Kinimaka who claim that they are the lawful heirs of the said Kinimaka & that all of his estate is vested in them & they further admit Richard Armstrong has been duly appointed Guardian of the said minor heirs.

And these Defendants humbly submits & insists that the prayer of the Complainant's Bill of Complaint upon the facts as they now appear before the Court should not be granted & that unless the allegations are established by proofs, they should be hence dismissed with costs, most wrongfully sustained.

PAL.

RICHARD ARMSTRONG,

Guardian of Kaniu, David Leleo, Kinimaka, Minors.

By ASHER B. BATES,

Their Solicitor.

Endorsed: Supreme Court. In Equity. David Kalakaua vs. Rich'd Armstrong &c. Answer. Filed 17 Aug't, 1858. Jno. E. Barnard, Clerk Sup. Court.

38

Supreme Court. At Chambers.

18 August, 1858.

DAVID KALAKAUA

vs.

PAI, RICHARD ARMSTRONG, Guardian of Kaniu, David Leleo, and Kinimaka.

Before Hon. E. H. Allen, Chief Justice.

Mr. Bates filed his answer by which he raised the question, admitting that Kaniu made a will leaving her property to David, that the property in controversy was justly awarded to Kinimaka in his own right, & denied that it was in trust for David.

Mr. Harris said that Kaniu married Kinimaka, & that before her death she made a verbal will leaving her property to David & it had been decided by Justice Robertson that the verbal will was good. That Kinimaka died in 1843. That at the division of the lands the Ili Onoulimaloo did actually belong to Kaniu and that he Kinimaka had no right except thro' Kaniu. That two house lots in Honolulu, & one Kalo patch at Kaleo—which he claimed was awarded to Kinimaka by the Land Commission Award 129 & 240 upon proof that they did belong to Kaniu. That if they belonged to Kaniu Kinimaka had no right to them, that he was not entitled to an award in his own right, but as the Guardian of David Kalakaua under the will of Kaniu he was entitled to an award.

Mr. Bates admitted that at the time of making the will the whole property was given to David—that at the time of her death she said to her husband, standing by at the time—that she wished him to take charge of all her property which she had willed to David

39 R. G. Davis sworn to as Interpreter.

C. KANAINA, sworn, says:

I knew Kaniu, I knew Kinimaka—I am the husband of Kekau-ohi one of the late Premiers. I was present at the great division of the lands by the Chiefs. I am acquainted with the land called Onoulimaloo⁵ on Molokai. That land was Kaniu's at the time of her death. Kinimaka was not entitled to sit in the Council with the King. Kaniu was not one of the King's Chiefs in Council. Kaniu was a high Chiefess & related to Kahaumanu, but that she was not one of the King's high Councillor Chiefs. This land originally belonged to Kaniu but when the King wished to divide the lands he wished all people who had received lands to come in and get them wanted. That in 1848 when they came in to get them divided and get their grants Kaniu was dead and the reason Kinimaka got the land was because he appeared for her and her heirs. I understood the land then to belong to David. I knew Kinimaka almost up to the time of his death. Kinimaka never told me that land belonged to him. Kinimaka spoke to me as if the land was David's as the

mother had ordered it to be. Kinimaka acted as a sort of Steward to David to look out for his property. The King knew about this Kauoha (will) & the Queen & the men all about. I was sitting with the Premier at Lahaina when Kinimaka came to tell her the news about his wife's death, & he told her about Kaniu's will. Kinimaka told the Premier at that time that David was to be her heir. Plenty people were sitting by at the time.

By Mr. BATES:

When Kinimaka came to the King & Chiefs he gave in an account of his own private lands & at the same time he gave an acc't of this land. It was directed that David should be the Konohiki
140 under the King.—I always supposed that David was entitled to the land & this is a new thing Kinimaka claiming the land. Kinimaka was a favorite of the King.

(Mr. Bates admitted that David commenced an action as soon as he was of age against Kinimaka before he deceased.)

Kinimaka & Kaniu had *on* children. He afterwards married Pae—Kaniu had a daughter by Gov. Adams but she is now dead Kaniu was considerably older than Kinimaka. She was not very old but she had no children.

Old Blue Law, pp. 47, 48, 49.

J. H. SMITH, sworn, says:

I was Secretary to the land Commission & am custodian of the Records of the Land Commission. I have the Records with me touching the matter in dispute. I refer to Land Commission No. 129 page 176, it contains the testimony relative to the lands in question which are marked in the bills as award 1602.

Mr. Davies interpreted the testimony as follows: Kekualaula was sworn, & said upon my request to Kaikuawa in 1834 for your place that it may be my place, because that place was a place lying open or waste. Haia consented to it & we fenced in the place, thereupon Kaniu went for it to the King but I did not know it. Kaikuawa came to me & said our work is done, that place is gone from us to the King's nurse Kaniu, that is all that I know about it up to the present time that we are now in. There was one person Lokai knew something about this talk, but she did not get the thing, the King did not consent to it.

John Ii was sworn & said sometimes recently before Kaniu obtained the place Haia had it—but he did not stop there but a short time when Haia was there only one house was built. I don't know who got it but I used to see Kaniu's people living there be-
141 fore the Law, and I heard from the daughter of Haia that the King had given it to Kaniu & it was accordingly gone.

Mr. Smith reexamined—

There was no other testimony given in regard to those lots—Kinimaka was the claimant. I don't know of any counter claimant. The date of the foregoing testimony was taken in Oct. 1846. It sometime turns out that the applicant to whom the land had been awarded, had merely been the agent of the other parties. After the

notification in the Newspaper the claim was allowed, if no counter claimants appeared. After the death of Mr. Richard's *death* no deliberations were taken, each Commissioner signed his award & it was signed by the others as a matter of course.—There are 3 lots awarded in the one award. They consist of two house lots on Punch-bowl St. & one down by the beach.

Mr. Davies Interpreted claim 240 K. p. 77. This claim was overlooked & was not entered before & this day in consequence of application having been made to the Privy Council & permission being given to enter it before the Land Commissioners therefore we do consent that the witness may be brought to this claim, that it may be made clear to the Land Comm'rs.

Mr. Smith reexamined—

It was customary to issue awards upon the Mahele book that was conclusive, & no evidence was required. No. 7130 is the number of the award of Onouli Maloo (p. 161) to Kinimaka, based on the division it was made upon the certificate of Thurston without any citation of witnesses to appear against it. This Onouli Maloo was only one of a number of lands awarded on that Certificate. I should suppose that Onouli Maloo is the one that C. Kanaina was testifying to. There is only one land of that name.

142 PUNIWAU, sworn, says:

I knew Kinimaka, & David & Kaniu,—David lived out at Kaniu's place after her death, until I grew up to a considerable age. I lived there all the time I was a boy & until a long time after I left school. I know all round the place until you come to a little pond. On the Ewa side the place abounds on a street that leads up to the church a Government St. & Leads past the Punch Bowl St. There is a fish pond on the Makai side the land goes to the fish pond. There are two houses on the lower side of it & then you come a little & there is a house where we brought David up & then you come to two more houses, & then you come to a house that is not a house. The house where the Boy was brought up was formerly the Chief house. It belongs to David. We the Kanakas all knew that it was David's house. Nawele, Kahina, & I, brought up David. Nawele kept him after Kaniu died. Kinimaka was in some way connected with David by his marriage with Kaniu. Kinimaka lived there under Kaniu & when she died we came in. Kinimaka lived on the place and looked out for it and we were the people under him. Kinimaka died on this place. Kaniu was the first Lord of the place and then Kinimaka & we under him. According to Kaniu's will the place was David's, but it was managed by Kinimaka. The place was David's but Kinimaka had all to do with it. Kinimaka thought the place was his, but Kaniu had willed it to David, but had instructed Kinimaka to take charge of it for David. I was there at the time she instructed him. Kinimaka was agreeable to that arrangement. Kinimaka left three children, they are young of different sizes.

KAHINA, sworn, says:

I lived upon the land in question up to Kinimaka's death, 143 David lived there too. Kalakaua we looked upon as the owner of the place. The place belonged to David & Kinimaka a man under him. The way that Kinimaka had rights there was that he was Kaniu's death. That she willed the place to David and Kinimaka had charge of it for David. Kinimaka always declared to us that the place was David's and that he was to take charge of it while he, David, was young. Up to the time of Paki's death I never heard Kinimaka say the land was his, he might have laid claim for what I know but I never heard him say so. Kaniu was our chief, we were Kaniu's servants but after Kaniu's death Kinimaka was head man to take charge of the place for David.

We considered David our chief.

The Court adjourned until to-morrow at 10 o'clock.

JNO. E. BARNARD,
Clerk Sup. Court.

19TH AUGUST, 1858.

The Court met pursuant to adjournment:

Mr. Harris was allowed to amend his petition by — after the figures No. [129]* the words and figures "129 confirmed by Royal Patent".

Mr. Bates assented to the interlineation. Mr. Bates made the following point—admitt-d that the land originally belonged to Kaniu who held it as the King's Konohiki, that notice was given to the King of the death of Kaniu & of her having given her property to David. That at the time of the great division the King took back his title to the land. At that time nobody appeared to represent Kaniu—That the King was cognizant of the Will granting the land to David, but that when he delivered out the grants afresh he did not deliver one to David, but to Kinimaka. None of the

144 Chiefs set up any claim for David and when Kinimaka sent in his claim the King granted the lands to him. That David's natural Guardians stood by and made no objection to their being granted to Kinimaka. That after its having been awarded to Kinimaka, no appeal was taken against the award and they were now estopped.

Mr. Harris produced the Record in the former case against Kinimaka to show that an action had been commenced against Kinimaka previous to his death.

Mr. Harris stated that Kinimaka having assented to his wife that he would take charge of the land for David. That at the time she gave the land to David, or to Kinimaka for David, the King had not the power to take the land from her, that he, the King, would only have been entitled to one-third which was a sort of Legacy duty. That if Kaniu had had any idea that Kinimaka would not take charge of it as Guardian, she would have passed it at once to David

[* Figures enclosed in brackets erased in copy.]

who she had adopted, overlooking Kapaakea her son. That David never lived with his father Kapaakea, & he Kapaakea claims no authority over him. That he always lived with Kaniu until her death. That Kinimaka having assumed the trusteeship was bound to make it know- on every occasion. That David having held a portion of Kaniu's land was possession of the whole, claimed whatever was contained in Royal Patent 1602 of Land Comm. Award No. 129.

JNO. E. BARNARD,
Clerk Supreme Court.

Endorsed: Supreme Court. David Kalakaua vs. Kinimaka. Proceedings. 18 Augt. 1858.

145 Supreme Court. In Equity.

DAVID KALAKAUA

vs.

RICHARD ARMSTRONG, Guardian of Kaniu, David Leleo, & Kinimaka, Minor Children of Kinimaka, Deceased.

Before Chief Justice E. H. Allen.

Now comes the Plaintiff in the above entitled cause, and in consideration of certain sums of money paid by Kinimaka during his lifetime, for his use and benefit, relinquishes all right to any and all land now included in the Estate of the said Kinimaka, and set forth in the petition in the above entitled cause. And discontinue my action for the same, saving and excepting the land of Onoulimaloo in the Island of Molokai and the 1st Apana of land set forth in Royal Patent No. 1602 filed in the cause.

And hereby discontinue my action as set forth in my Bill of Complaint, in the above entitled suit except for the said land of Onoulimaloo and for the Apana No. 1 Royal Patent No. 1602 hereinabove referred to.

DAVID KALAKAUA.

Nov'r 2nd, 1858. Supreme Court Room, Honolulu, Oahu.

Endorsed: Supreme Court David Kalakaua vs. Richard Armstrong Guardian of Kaniu, David Leleo & Kinimaka Minor children of Kinimaka, deceased. Discontinuance except for land Onoulimaloo & Apana 1 Royal Patent No. 1602. Filed 2nd Nov'r 1858. Jno. E. Barnard, Clerk Sup. Court.

146

Supreme Court.

(In Equity.) At Chambers, 2 Nov'r, 1858.

DAVID KALAKAUA

vs.

RICHARD ARMSTRONG, Guardian of Kaniu, David Leleo, & Kinimaka, Minor Children of Kinimaka, Deceased.

Before Hon. E. H. Allen, Chief Justice.

The Court did order adjudge and decree in this matter that Mr. Armstrong, as Guardian of Kaniu, David Leleo and Kinimaka, Minor Children of Kinimaka deceased, do convey to David Kalakaua the plaintiff in this cause, the land named Onoulimaloo on the Island of Molokai, and the first Apana of land set forth in Royal Patent No. 1602 filed in this cause.

JNO. E. BARNARD,

Clerk Supreme Court.

Endorsed: Supreme Court. David Kalakaua vs. Richard Armstrong, Guardian of Kaniu, David Leleo & Kinimaka, Minor Children of Kinimaka dec'd. Proceedings. 2 Nov'r 1858.

147

APPENDIX E.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

At Chambers. In Equity.

KAPIOLANI ESTATE, LIMITED, Plaintiff,

vs.

MARY H. ATCHERLEY, Defendant.

Bill for Injunction, &c.

Amended Bill.

To the Honorable A. S. Humphreys, First Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, Sitting in Chambers:

Your petitioner, the Kapiolani Estate, Limited, a corporation having its place of business in Honolulu, Island of Oahu, Territory of Hawaii, for an amended complaint herein, as per stipulation between the parties hereto, dated the — day of April A. D. 1902, on file in this case in court, represents and says:

1. That the defendant herein is a resident of Honolulu, Island of Oahu, Territory of Hawaii.

2. That on the 31st day of July A. D. 1901 said defendant herein filed an action of Ejectment against the plaintiff herein in the Circuit court of the first Judicial Circuit to recover possession of a certain parcel of land situate on Queen street, in Honolulu aforesaid, a copy of the declaration in ejectment in said action being hereto annexed and made a part hereof, the land covered by
148 said declaration being land claimed by the plaintiff in fee simple, and being also claimed in fee simple in said action of ejectment by defendant as aforesaid.

That said land is bounded and described as follows:

Apana 1, on Punchbowl street, commencing at the south corner of Queen and Punchbowl streets, and running S. 68 W. 7 chains 42 $\frac{3}{12}$ feet to the mauka side of the fish pond of H. Kalama, joining Punchbowl street; thence along the mauka edge of said pond S. 52 E. 4 chains 50 $\frac{2}{12}$ feet to the west corner of lot of Ke; thence N. 47 E. 2 chains 29 feet, N. 31 W. 23 $\frac{9}{12}$ feet, and N. 47 $\frac{3}{4}$ E. 4 chains 2 $\frac{8}{12}$ feet; all these lines join the house lot of Ke; thence N. 49 $\frac{1}{4}$ W. 39 $\frac{7}{12}$ feet to commencement, and containing an area of, to wit 2.32 acres.

3. That on or about the 29th day of December A. D. 1856 one David Kalakaua under and through whom the plaintiff claims title to the land named in paragraph 2 of this bill, litigated his title to said land with the following parties, under whom the defendant claims title to said land, to-wit, Kinimaka, and Pai, his wife, and their children hereinafter named, said litigation taking place in the Supreme Court of the then Hawaiian Islands, in equity; and, in this behalf and connection, and more particularly, the plaintiff alleges that, on the 29th day of December A. D. 1856, said David Kalakaua filed his petition in equity in the Supreme Court of the Hawaiian Islands against the said Kinimaka, claiming that the said Kinimaka held title to the land named in paragraph 2 of this bill in trust and as the guardian, of said Kalakaua, and not otherwise, and praying that said Kinimaka might be declared trustee of
said land for said David Kalakaua, and that he might be
149 decreed to convey the same in fee to the said David Kalakaua in execution of the trust alleged and set up as aforesaid in said bill of complaint, which said bill of complaint, or petition, marked Exhibit A, is hereto attached and made part hereof.

4. That, upon this petition, a summons was thereafter duly issued and served, a copy of which summons, marked Exhibit "B," is hereto attached and made a part hereof.

5. Your petitioner is informed and believes, and upon such information and belief alleges; that thereafter, to-wit, on or about January 24th, 1857, after service of the aforesaid petition, and before filing an answer thereto, the said Kinimaka died.

6. Your petitioner is informed and believes, and upon such information and belief alleges, that the said Kinimaka, at the time of his decease, left him surviving a widow, Pai, and, as his devisees, three children, to-wit, Kaniu Kinimaka (w), David Leleo Kinimaka, and Moses Kapaakea Kinimaka, to which said children the said Kinimaka devised all his real estate including the property

in question. The will of said Kinimaka, together with all of the papers, exhibits and pleadings on file in the Supreme Court of the Hawaiian Islands in the Estate of said Kinimaka being made a part of this bill of complaint, plaintiff craving leave to refer thereto without incorporating said records more formally and fully in this complaint.

7. That the said David Kalakaua claimed that, under said will of said Kinimaka, his said children and widow then and there became trustees of the property which is the subject matter of
150 this bill of complaint, for the benefit of said David Kalakaua, and in the same manner and under the same trusts as formally held by said Kinimaka.

8. That thereafter and on the 16th day of March 1857 said David Kalakaua filed a suggestion in the Supreme Court of the then Hawaiian Islands, in equity, to the effect that said Kinimaka had deceased before answering his original petition filed as aforesaid on the 29th day of December 1856; that the said Kinimaka had left, surviving him, a widow, Pai, and three minor children, as heirs by the will of him, the said Kinimaka, and praying that the said widow and children be made parties to said original suit, and that a guardian ad litem be appointed for said children; a copy of which suggestion, marked Exhibit "C," is hereto annexed and *part a part* hereof.

9. That thereafter, to-wit, on March 8th, 1858, the said David Kalakaua filed a petition for the administration of the Estate of one Kaniu, deceased, under whom said Kalakaua claimed said land, and for the appointment of an administrator, and for the appointment of a guardian ad litem for the three minor children of Kinimaka, deceased. A copy of said petition, marked Exhibit "D" is hereto annexed and made a part hereof.

10. That, upon reading and filing the said petition an order was made appointing George E. Beckwith administrator of the Estate of Kinimaka, deceased, guardian ad litem of the three minor children of the said Kinimaka. A copy of said order, marked Exhibit
"E," is hereto annexed and made a part hereof.

151 11. That upon this petition, to-wit, the petition set forth in paragraphs 9 and 10 of this bill, a summons was duly issued, citing George E. Beckwith, administrator of the Estate of Kinimaka, deceased and guardian ad litem of the minor children, and Pai, the widow of said Kinimaka; a copy of which summons, marked Exhibit "F," is hereto annexed and made a part hereof.

12. That upon this petition a hearing was afterwards had and evidence taken. A copy of the record of the proceedings and of the evidence taken thereat, marked Exhibit "G," is hereto annexed and made a part *a part* hereof.

13. That thereafter a decree was rendered in the said cause by the Honorable G. M. Robertson, and duly filed, adjudging the said David Kalakaua to be the devisee of the said Kaniu, deceased and directing letters testamentary to be issued to him. A copy of said judgment and decree, marked Exhibit "H," is hereto attached and made a part hereof.

14. That thereafter, to-wit, on May 3d, 1858, letters testamentary

were duly issued to the said David Kalakaua, as administrator of the Estate of Kaniu, deceased; a copy of said letters testamentary, marked Exhibit "I," being hereto attached and made a part hereof.

15. That afterwards, to-wit, upon June 19th, 1858, the said David Kalakaua filed a further petition alleging substantially the same facts as in the petitions of December 29th, 1856, and of March 16, 1857, with the additional fact that one Richard Armstrong had been appointed guardian of the minor children, and praying that he, as such, might be ordered to convey the said lands now in question to the said petitioner, David Kalakaua. A copy of said petition, marked Exhibit "J," is hereto annexed and made a part hereof.

16. That upon this petition a summons was duly issued and served upon Richard Armstrong as guardian of the said minor children of Kinimaka, and Pai; a copy of which said summons, marked Exhibit "K," is hereto annexed and made a part hereof.

17. That thereafter the defendants duly filed an answer to said petition; a copy of which said answer, marked Exhibit "L," is hereto annexed and made a part hereof.

18. That thereafter, to-wit, upon August 18th, 1858, in chambers, before the Honorable E. H. Allen, Chief Justice of the Supreme Court of the Kingdom of Hawaii, evidence was taken and the cause was heard upon the merits. A copy of the records of the proceedings in said cause and the evidence taken therein, marked Exhibit "M," is hereto annexed and made a part hereof.

19. That thereafter, to-wit, upon November 2d, 1858, the Honorable E. H. Allen, Chief Justice, in Chambers, adjudged and decreed as follows—which decree was duly entered upon the records of said court: "David Kalakaua against Richard Armstrong, guardian of David Leleo, Kaniu, and Kinimaka, minor children of Kinimaka, deceased. The court did order, adjudge and decree in this matter that Mr. Armstrong, the guardian of David Leleo, Kaniu, and Kinimaka, minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this case, the land named Onoulimaloo, on the Island of Molokai, and the first Apana of land set forth in Royal Patent 1602 filed in this cause. John E. Barnard, Clerk of the Supreme Court." A copy of said decree, marked Exhibit "N," is hereto attached and made a part hereof.

20. That the said Richard Armstrong, was, in fact, at that time the duly appointed guardian of the said minor children, having been appointed thereto by the Honorable G. M. Robertson on May 5th, 1858, upon the petition of Pai, the widow of said Kinimaka and the mother of said minor children. A copy of said petition, marked Exhibit "O," and a copy of said appointment marked Exhibit "P," being hereto annexed and made parts hereof; and the entire record, including all of the papers and exhibits of said guardianship matter as now on file in the Supreme Court of the Hawaiian Islands, in equity, being made a part hereof, and complainant craving leave to refer to the same as if the same were more formally and fully incorporated in this bill of complaint.

21. That it does not appear from the records either of the court

or in the Registry of deeds, in Honolulu, Hawaiian Islands, that the said decree of the Supreme court directed against Richard Armstrong as guardian of said minor children of Kinimaka, deceased, and ordering a conveyance of the property to said David Kalakaua, was, in fact, obeyed by the said Richard Armstrong, but, after said decree was made, the said David Kalakaua ceased to be molested in any way by either the widow and heirs aforesaid of said Kinimaka, or by the said Armstrong in their behalf, and retained open, notorious, and undisputed possession, and dealt with the said land in all ways as his own, and continued to do so until he disposed of the said property.

154 And complainant hereby makes all papers, pleadings and exhibits of whatsoever kind in said equity proceedings a part of this bill of complaint, and makes profert thereof, and asks leave to refer to the same as fully and effectually as if actually incorporated in extenso in this bill of complaint.

And, in this connection, the complainant attaches hereto a copy of the original land commission award and royal patent, and copies of the original record of evidence given before the Land Commission in support of said land commission award and royal patent, the same being referred to and made a part of the evidence in said equity proceedings instituted in the years 1856 and 1857 above referred to, which said copies are made a part of this bill of complaint, being marked respectively Exhibits "Q", "R" and "S".

22. That the successors in title of the said David Kalakaua have at all times retained and been in open, notorious and, until on or about January first, 1900, undisputed possession of the said property, and have, in all ways, dealt with it at their own; that the petitioner herein is a bona fides purchaser for a valuable consideration, and without notice of the aforesaid property, and that it claims title thereto from the said David Kalakaua as follows, to-wit: by a deed from David Kalakaua to Luakini and wife, dated March 9th, 1868, and recorded in Oahu Registry of deeds, book 25, page 332; by a deed from Luakini and wife to Kapiolani dated April 1st, 1868, and recorded in Oahu Registry of deeds, book 25, page 336; by a deed from Kapiolani to David Kawananaokoa and Jonah Kalaniana'ole, dated February 10th, 1898, and recorded in Oahu Registry of deeds, book 176, page 232; by a deed from David Kawananaokoa and Jonah

Kalaniana'ole to E. H. Wodehouse, dated July 12, 1898, and recorded in Oahu Registry of deeds book 181, page 294; by a deed from E. H. Wodehouse to David Kawananaokoa and Jonah Kalaniana'ole, dated June 25th, 1899, and recorded in Oahu Registry of deeds, book 195, page 233; by a deed of David Kawananaokoa and Jonah Kalaniana'ole to Kapiolani Estate, Limited, dated August 7th, 1899, and recorded in Oahu Registry of deeds, book 194, page 427.

23. Your petitioner is informed and believes, and upon such information and belief alleges, that the said children of the said Kinimaka, to-wit, Kaniu, David Leleo, and Moses Kapaakea, to whom the said Kinimaka devised his interest in the said property in question, to-wit, his bare legal title therein, which the said children re-

ceived and held in trust for the said David Kalakaua and his successors in title, were at all times well aware that the said David Kalakaua and his successors were in the said open, notorious and undisputed possession of said property, and dealing with it as their own.

24. That the said Kaniu Kinimaka attained the age of majority about the year 1867; that the said David Leleo Kinimaka attained the age of majority about the year 1871; that the said Moses Kapaakea Kinimaka attained the age of majority about the year 1877; that, at no time did they or any of them assert any claim in or to any of the said lands, or in any way deny the rights of the said David Kalakaua and his successors in title thereto, but, they at all times acquiesced in the open, notorious and undisputed possession and claim of the said David Kalakaua, and his successors in title in and to all of the aforesaid property.

156 25. That by the will of the said Kinimaka aforesaid all of his property was devised to his said daughter, Kaniu, for her lifetime, and then to his son, David Leleo Kinimaka, for his lifetime, and the remainder to his son, Moses Kapaakea Kinimaka; that the said Moses Kapaakea Kinimaka, claiming to own the land in question, sold his alleged estate in remainder to defendant May 18th, 1897, by deed recorded in the office of the Registry of conveyances in Honolulu, book 167, page 368; that the said David Leleo Kinimaka died before Kaniu Kinimaka; that on January 4th, 1901, said Kaniu Kinimaka died, and the defendant herein claims that, by reason of her death, a fee simple estate is vested in her, the defendant, with the right of immediate possession under and by virtue of said deed to her, said defendant, from said Moses Kapaakea Kinimaka.

26. That the said plaintiff in the present cause has a clear and unbroken chain of title to the said lands by mesne conveyances from Kalakaua, Luakina and wife, Kapiolani, David Kawananaokoa and Jonah Kalaniana'ole, and E. H. Wodehouse; all of which deeds are duly recorded in the office of the registry of deeds, and that said plaintiff has, today, all the right, title and interest formally held by the said David Kalakaua in and to the said lands.

27. That owing to the failure on the part of the said Richard Armstrong as guardian of the children, David Leleo, Kaniu, and Moses Kapaakea Kinimaka, of Kinimaka, deceased, and his devisees of the land in question, to convey of record their interest as ordered by the court, plaintiff's record of chain of title from the deceased to him, by virtue of the above mentioned decree, through which plaintiff claimed, is incomplete.

57 28. That by the said actions in ejectment the defendant seeks to take an unconscionable advantage of the above mentioned technical error in the chain of title of your petitioner. That said claims constitute a cloud upon the title of petitioner in and to the land aforesaid, and that defendant is using the fact that the legal title to said land is in her as aforesaid to harass plaintiff with litigation, and to cloud its title and to shut plaintiff out of the due and full enjoyment of the same.

29. That it would be inequitable to allow the present defendant to prosecute her action of ejectment until the bare legal title to the property in question which she is holding wrongfully, and against the right of the petitioner, and as naked trustee thereof, should by her be conveyed to said petitioner.

30. That owing to the above recited facts, and to the fact that the present defendant is a married woman, your petitioner herein has no plain, complete and adequate remedy at law.

31. That for this court to issue its restraining order as herein prayed for would avoid a multiplicity of suits in the premises, and work no inequity to the defendant.

Wherefore, and in as much as your petitioner is remediless by the strict rules of the common law, and can have relief only in such court of equity, where such matters are properly cognizable, your petitioner prays that the process of this Honorable court may issue against said defendant, summoning her to appear and answer
158 this complaint, and be bound by the proceedings thereunder, and to abide by all further orders and decrees of this Honorable court.

(b) That a temporary injunction may issue out of this Honorable court, restraining the defendant herein, her counsellors, solicitors, attorneys and agents, from the further prosecution of her action in ejectment until the further order of this court.

(c) That a permanent injunction may issue out of this Honorable court restraining the defendant herein from proceeding with any further action at law under any claim of title to the aforesaid lands, derived either directly or indirectly through Kinimaka, deceased.

(d) That the defendant herein may be declared to be the trustee of all the right, title and interest of the said Kaniu Kinimaka, David Leleo Kinimaka and Moses Kapaakea Kinimaka, in and to the lands in question, for the benefit of the petitioner, as a cestui que trust, and that as such trustee she may be ordered to convey all such interests to the said petitioner.

(e) That this Honorable court may order and decree to the petitioner any such further and other relief as to this court may seem proper in the premises, together with the costs incurred in this suit

KAPIOLANI ESTATE, LTD.,

By Its Treasurer, JOHN F. COLBURN.

KINNEY, BALLOU & McCLANAHAN,

Att'ys for Pl'ff.

159 ISLAND OF OAHU,
Territory of Hawaii, ss:

John F. Colburn, being first duly sworn, on oath deposes and says:
That he is the Treasurer of the Kapiolani Estate, Limited; that he has read the foregoing bill of complaint, and knows the contents thereof, and that all the matters and things therein alleged are true,

except as to those matters and things alleged on information and belief, and, as to those matters, he believes them to be true.

JOHN F. COLBURN.

Subscribed and sworn to before me this 16 day of April A. D. 1902.

[SEAL.]

CARLOS A. LONG,
Notary Public First Judicial Circuit.

Endorsed: Circ-t Ct. 1st Circ't. In Equity. Kapiolani Est. Ltd. vs. Mary H. Atcherley. Amended bill for Injunction & C. E. 1246 18/410. Filed April 16, 1902. A. G. Kaulukou, Clerk.

160

EXHIBIT "Q."

Helu 129. Kinimaka.

Ua koi mai oia no kona mau whai ma Honolulu no ka mea, ua loaa ia ia keia mau whai maa ka makahiki 1834, a ua noho keakea ole ia a hiki i keia manawa.

Oia ka makou e hooko nei no Kinimaka he kuleana hoi kona malalo o ke ano Alodio. Ina e uku mai oia i ko ke Aupuni hapaha, alaila ua kupono ia ia ka palapala Sila Alodio.

Pono no nae ia ia ke uku no ka hookolokolo a me ka hooholo ana i ka olelo Penei,

Wm. L. Lee.	No ka rumi a me ke pai ana i ka olelo	
J. H. Smith.	me ka Nupepa	\$1.
S. M. Kamakau.	No ke kope ana i ka olelo koina.....	
Z. Kaauwai.	2 Aoao	1.
Ioane Ii.	No ka palapala kii.....	.50
	No ka hana ana i ka la 24 Okatoba	
	1846	1.
No ke kope ana i ka olelo a na hoike 2 aoao.....		1.50
No ke ana ana i ka la.....		2.50
No ke kope ana.....		.50
No ka hooholo ana i ka olelo Aperila 10, 1849.....		2.50
		<hr/>
		\$10.50

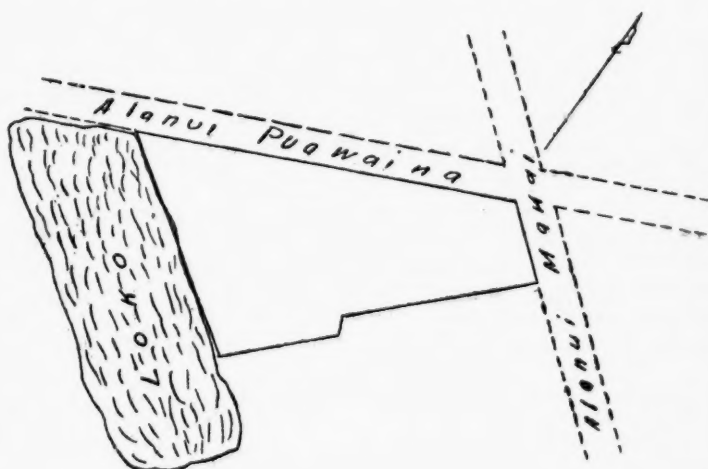
Eia na palena.

Anaia e D. Kalanikahua.

Apana 1.

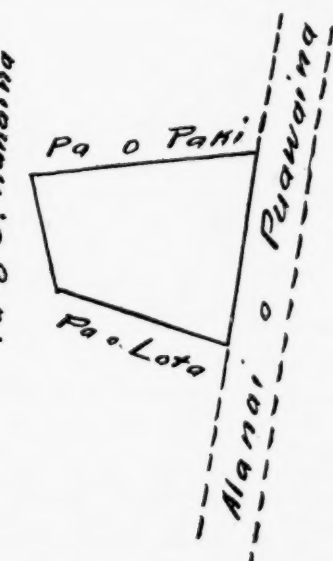
Ke ano o ke ana ana i kekahi Apana pahale o Kinimaka ma Honolulu, i Oahu. Ma ka aoao makai o ke Alanui makai ma ka aoao Hema hoi o ke Alanui Puawaina. E hoomaka ana i ke ana ana ma ka huina Hema, e hui ai ke Alanui makai me ka Alanui
 161 Puawaina. A moe aku ka aoao Hema 68° Komohana 7 Kaulahao $42 \frac{3}{12}$ Kapuai hiki ma ka aoao mauka o ka loko ia a H. Kalama, e pili ana no i ke Alanui Puawaina, huli a holo ma ka lihi mauka o ua loko la Hema 52° Hikina 4 Kaulahao $50 \frac{2}{12}$ Kapuai hiki i ke kihi Komohana o ka pa o Ke e pili ana no i ka loko ia, huli Akau 47° Hikina 2 Kaulahao 29 Kapuai huli Akau 31° Komohana, a holo iki 23 $\frac{9}{12}$ Kapuai, huli Akau $47^{\circ} 45'$ Hikina 4 Kaulahao $2 \frac{8}{12}$ Kapuai, e pili ana ia pae aoao a pau i ka pahale o Ke, alaila huli i kahi i hoomaka'i ke ana ana Akau $49^{\circ} 15'$ Komohana 1 Kaulahao 39 $\frac{7}{12}$ Kapuai.

Eia ka ili 2 Eka 2 Kaulahao 28 Anana 15 Kapuai.



Apana 2.

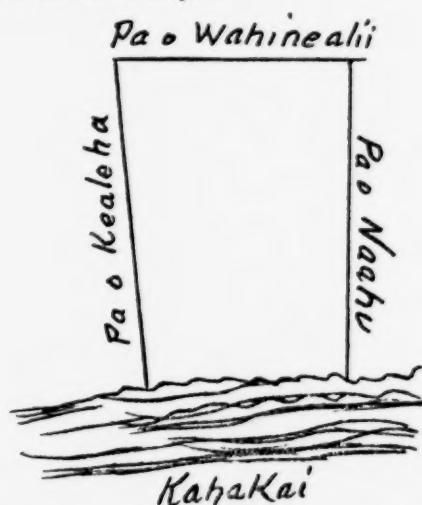
Ke ano o ke ana ana i kekahi Apana pahale o Kinimaka ma Honolulu i Oahu ma ka Aoao Akau o ke Alanui Puawaina makai hoi ka pa o Paki mauka iho hoi o ka pa o Lota. E hoomaka ana i ana ana ma ke kihi Hema o ka pa o Paki, ma ka aoao Akau hoi ke Alanui Puawaina, A moe aku ka aoao mua Akau $35^{\circ} 30'$ Komohana 2 kaulahao 45 6/12 Kapuai hiki i ke kihi Kikina o ka pa o Lota. Kaniana huli Hema 53° Komohana 1 Kaulahao 24 5/12 Kapuai i ke kihi Akau o ka pa o Lota, huli Hema $14^{\circ} 30'$ Hikina 2 kaulahao 18 6/12 Kapuai hiki i ke kihi Hikina o ka pa o Lota, huli hiki i kahi i hoomaka'i ke ana ana Akau $68^{\circ} 15'$ Hikina 2 kaulahao 18 6/12 Kapuai hiki i ke kihi Hikina o ka pa o Lota, Eia ka ili 545 Anana 12 Kapuai.



Apana 3.

E kii o ka pahale o Kinimaka ma Honolulu i Oahu e pili ana i kahakai, aia makai iho o ka pa o Wahinealii ma Waikiki hoi o ka pa o Kealoha ma Ewa hoi o ka pa o Naahu. E hoomaka ana i ke ana ana ma ke kihi Hema o ka pa o Kealoha e pili ana i ke kahakai. A moe aku ka aoao mua Akau $61^{\circ} 30'$ Komohana 1 Kaulahao 60 9/12 Kapuai, hiki i ke Komohana o ka pa o Wahinealii, huli Hema $22^{\circ} 30'$ Hikina 1 Kaulahao 21 9/12 kapuai, hiki i ke kihi Hema o ka pa o Wahinealii, huli Hema $69^{\circ} 30'$ Komohana 1 kaulahao 53 6/12 kapuai hiki i ke kihi Komohana o ka o

Naahu e pili ana i ke kahakai alaila huli i kahi i hoomawa'i Akau
27° Komohana 1 kaulahao 9 3/12 kapuai.
Eia ka ili 278 Anana 11 Kapuai.



Pono nae iaia ke uku mai no ka hookolokolo ana a me ka hooholo
ana iho i ka olelo Penei.

No keia mau Apana 2, 3..... \$10.50

A true translation of which Award is as follows:

164

Number 129, Kinimaka.

He has claimed as his certain premises at Honolulu on the ground
that he received these premises in the year 1834, and has had un-
disturbed possession up to this time.

In these lands we award to Kinimaka a freehold estate less than
allodial. Should he pay the government communication, a Patent
will be issued to him in fee simple.

But it is proper for him to pay for the hearing and the deciding
of the claim. Thus,

	For advertising the claim in the news- paper	\$1.00
	For recording the claim 2 pages.....	1.00
Wm. L. Lee.	For the diagram.....	.50
J. H. Smith.	For working the 24th day of October, 1846	1.00
S. M. Kamakau.	For recording the testimony of the wit- nesses 2 pp.	1.50
Z. Kaauiwai.	For surveying one day	2.50
Ioane Ii.	For recording50
	For deciding the claim April 10, 1849.	2.50

These are the boundaries,
Survey by D. Kalanikahua.

10.50

Lot 1.

Survey of a houselot of Kinimaka in Honolulu, Oahu, on the lower side of Makai St. and the south side of Punchbowl St. Beginning the survey at the south corner of the junction of Makai and Punchbowl streets and running,

S. 68° W. 7 chains $42 \frac{3}{12}$ feet to the upper sides of the fish pond of H. Kalama, adjoining Punchbowl St. turn and run along the upper edge of said pond S. 52° E. 4 chains $50 \frac{2}{12}$ ft. to the West corner, of the lot of Ke adjoining the fish pond; turn N. 47° E. 2 chains 29 ft. turn N. 31° W. and run a little, $23 \frac{9}{12}$ feet, turn N. 47° 45' E. 4 chains $2 \frac{8}{12}$ ft.; all those sides join the house lots of Ke; thence turn to place of beginning. N. 49° 15' W. 1 chain $39 \frac{7}{12}$ ft. Area 2 acres 2 chains 28 fathoms, 15 feet.

Diagram.

165

Lot 2.

Survey of a houselot of Kinimaka situate on the north side of Punchbowl St. and below the lot of Paki, and above the lot of Lota; Beginning the survey on the South corner of the lot of Paki, and the north side of Punchbowl St., the first side lies,

N. 35° 30' W. 2 chains $45 \frac{6}{12}$ ft. to the east corner of the lot of C. Kanaina turn S. 53° W. 1 chain $24 \frac{5}{12}$ ft. to the north corner of the lot of Lota; turn S. 14° 30' E. 2 chains $18 \frac{6}{12}$ ft. to the south corner of the lot of Lota; then turn to place of beginning. N. 68° 15' E. 2 chains $15 \frac{10}{12}$ ft. Area 545 fathoms 12 feet.

Diagram.

166

Lot 3.

The plan of the house lot Kinimaka at Honolulu, Oahu, joining the beach which is makai of the lot of Wahinecalits and Waikiki of the lot of Kelalocha and Ewa of the lot of Nachu. Beginning the survey at the south corner of the lot of Kealoha adjoining the beach the first side lies.

N. 61° 30' E. 1 chain $60 \frac{9}{12}$ feet to the west side of the lot of Wahinealii; turn S. 22° 30' E. 1 chain $21 \frac{9}{12}$ feet to the south corner of the lot of Wahinealii; turn S. 67° 30' W. 1 chain $53 \frac{6}{12}$ feet to the west corner of Naahu adjoining the beach; thence turn to place of beginning. N. 27° W. 1 chain $9 \frac{3}{12}$ feet. Area 278 fathoms 11 feet.

Diagram.

It is proper for him to pay for the hearing and deciding the *calim* thus,

For these lots, 2, 3..... \$10.50

167

EXHIBIT "R."

Helu 1602.

Palapala Sila Nui.

A ke Alii, Mamuli o ka Olelo a ka Poe Hoona Kuleana.

No ka Mea, Ua hooholo na Luna Hoona i na kumu kuleana aina i ka olelo, he kuleana oiaio ko Kinimaka Kuleana Helu 129. ma ke ano Kuleana Nui malalo o ke Ano Alodio—iloko o kahi I oleloia malalo, a no ka mea ua haawi mai o ua Kinimaka nei, iloko o ka Waihona Dala Aupuni i Kanawalu Kumamalua 50/100 dala no ke Aupuni Kuleana iloko o ia aina.

No laila, ma keia Palapala Sila Nui, ke hoike nei o Kamehameha III ke Alii Nui a ke Akua i kona lokomaikai i hoono ho ai maluna o ko Hawaii Pae Aina, ina kanaka apau, i keia la nona iho, a no kona mau hope Alii ua hoolilo, a ua haawi aku oia, ma ke ano alodio ia Kinimaka i kela wahi a pau loa ma Honolulu ma ka Mokupuni o Oahu penei na mokuna:

Apana 1—ma Ala Puawaina. E hoomaka ma ka huina Hema o ke Ala Aliiwahine me ke Ala Puawaina, a e holo Hema 68° Kom. 7 Kaul. $42 \frac{3}{12}$ kapuai hiki i ka aoao mauka o ko loko ia a H. Kalama, e pili ana no i ke Alanui Puawaina, alaila ma ka lihi mauka o ia loko Hema 52° Hik. 4 Kaul. $50 \frac{2}{12}$ kapuai, hiki i ke kihi Kom, o ka pa o Ke, alaila Akau 47° Hik. 2 Kaul. 29 Kapuai. Akau 31° Kom. $23 \frac{9}{12}$ Kaul. a Akau $47\frac{3}{4}^{\circ}$ Hik. 4 Kaul. $2 \frac{8}{12}$ Kapuai, e pili ana ia pae aoao apau i ka pahale o Ke, alaila Akau $49\frac{1}{4}^{\circ}$ Kom. $39 \frac{7}{12}$ Kapuai a hiki i ka hoomaka ana.

2.52 Eka.

168 Apana 2—ma Ala Puawaina. E hoomaka ma ke kihi Hema o ka pa o Paki, ma ke aoao Akau hoi o ka ala Puawaina, a e holo Akau $35\frac{1}{2}^{\circ}$ Kom. 2 Kaul. $45 \frac{6}{12}$ Kapuai, hiki i ka pa o Kanaina, alaila Hema 53° Kom. 1 kaul. $24 \frac{5}{12}$ kapuai, hiki i ka pa o Lota, alaila ema $14\frac{1}{2}^{\circ}$ Hik. 2 Kaul. $18 \frac{6}{12}$ kapuai hiki i ke ala Puawaina, alaila Akau $68\frac{1}{4}^{\circ}$ Hik. 2 Kaul. $15 \frac{10}{12}$ kapuai a hiki i kahi i hoomaka'i.

545 Anana.

Apana 3—ma Kahakai. E hoomaka ma ke kihi Hema o ka pa o Kealoha, e pili ana me kahakai, a holo Akau $61\frac{1}{2}^{\circ}$ Hik. 1 Kaul. $60 \frac{9}{12}$ kapuai hiki i ke kihi Kom. o ka pa o Wahinealii alaila, Hema $22\frac{1}{2}^{\circ}$ Hik. 1 Kaul. $21 \frac{9}{12}$ kapuai, hiki i ka pa o Naahu, alaila Hema $67\frac{1}{2}^{\circ}$ Kom. 1 Kaul. $53 \frac{6}{12}$ kapuai ma ia pa a hiki i kahakai, alaila Akau 27° Kom. 1 Kaul. $9 \frac{3}{12}$ kapuai a hiki i kahi i hoomaka'i.

278 Anana.

Maloko oia mau Apana 3.20 Eka a oi iku aku, a emi iki mai paha. Ua koe nae i ke Aupuni no mine minerala a me na metala a pau.

No Kinimaka ua aina la i haawiia ma ke ano Alodio.—a no kona

nau hooilina, ame kona waihona; ua pili nae ka auhau a na Poe
 Ahaolelo e kau like ai ma na aina alodio i kela manawa keia manawa.
 A i mea e ikeai ai, ua kau wau i ko'u inoa, a me ka Sila Nui
 ko Hawaii Pae Aina ma Honolulu i keia la 30 o Augate 1853.

Inoa: KAMEHAMEHA.

Inoa: KEONI ANA.

A true translation of which Royal Patent is as follows:

69

Number 1602.

Royal Patent.

of the King in accordance with the report of the Land Commis-
 sioners.

Whereas the Board of Commissioners to Quiet-Land titles has
 awarded to Kinimaka by Award No. 129 a freehold estate less than
 allodial in the premises mentioned below, and,

Whereas, Kinimaka has paid into the government treasury eighty-
 two and 50/100 Dollars for the government's rights in said land,

Therefore by this Royal Patent Kamehameha III, the Great King
 over the Hawaiian Islands by the Grace of the Lord, shows to all
 men this day for himself and his kingly successors that he has con-
 veyed and granted in fee simple to Kinimaka that land at Honolulu
 in the Island of Oahu with these boundaries.

Lot in Punchbowl St. commencing at the south corner of Queen
 and Punchbowl Streets and running; S. 68° W. 7 chains 42 3/12
 to the upper side of the fishpond of H. Kalama adjoining Punch-
 bowl St. thence along the upper edge of said pond; S. 52° E. 4
 chains 50 2/12 ft. to the west corner of the lot of Ke; thence N. 47°
 E. 2 chains 29 ft. N. 31° W. 23 9/12 ft. and N. 47 3/4° E. 4 chains
 8 1/12 ft.; all these sides join the house lot of Ke; thence N. 49 1/4°
 E. 39 7/12 ft. to commencement 2.52 acres.

Lot 2 on Punchbowl St. commences at the south corner of the lot
 of Paki and north side of Punchbowl St. and run; N. 35 1/2° W. 2
 chains 45 6/12 — to the lot of Kanaina; thence S. 53° W. 1 chain
 5 1/12 ft. to the lot of Lota; thence S. 1/4° E. 2 chains 15 10/12 ft.
 to place of commencement.
 545 fathoms.

70

Lot 3 at Beach.

Commencing at the south corner of the lot of Kealaha adjoining
 the beach and running N. 61 1/2° E. 1 chain 60 9/12 ft. to the west
 corner of the lot of Wahie III, thence S. 22 1/2° E. 1 chain 21 9/12
 ft. to lot of Noahu; thence S. 67 1/2° W. 1 chain 53 6/12 ft. along
 the lot to beach; thence N. 27° W. 1 chain 9 3/12 ft. to place of
 commencement.
 278 fathoms.

Within these lots 3.20 acres more or less. All mineral and metal

mines are reserved to the Government. This land is Kinimaka's. It is granted in fee simple to him, his heirs and devisees, subject however, to the tax laid by the legislature from time to time upon fee simple land.

In witness whereof I have put here my name and the great seal of the Hawaiian Islands this 30th day of August 1858.

Name: KAMEHAMEHA.

Name: KEONI ANA.

171

EXHIBIT "S."

Copy of Transfer in Mahele Book.

"Ko Kamehameha.

Na Aina.	Ahupuaa.	Kalana.	Mokupuni.
Kukuiwaluhia	"	Kohala	Hawaii.
Keahi	"	Hamakualoa	Maui.
Aleamai	"	Hilo	Hawaii.
Wainuku	"	Kau	Hawaii.
Kahilipali	"	"	"
Ponahawai	"	Hilo	"
Kalaoa	"	Kona	"
$\frac{1}{2}$ Keana	"	Koolau	Oahu.

Ke ae aku nei au i keia mahele ua maikai.

No ka Moi na aina i kakauia maluna, aohe ou kuleana maloko.

KINIMAKA.

Hale Alii, Feb. 9, 1848.

A true translation of which is as follows:

"For Kamehameha.

The lands.	Ahupuaa.	Kalana.	Island.
Kukuiwaluhia	"	Kohala	Hawaii.
Keahi	"	Hamakualoa	Maui.
Aleamai	"	Hilo	Hawaii.
Wainuku	"	Kau	"
Kahilipali	"	"	"
Ponahawai	"	Hilo	"
Kalaoa	"	Kona	"
$\frac{1}{2}$ Keana	"	Koolau-loa	Oahu.

I hereby assent to this division. It is good.

To the King are the lands above written, I have no right therein.

KINIMAKA.

Palace, Feb. 9, 1848.

172

" Ko Kinimaka.

Na Aina.	Ahupuaa.	Kalana.	Mokupuni.
Maihi	"	Kona	Hawaii.
Kalahiki	"	"	"
Onouli, malo	"	"	Molokai.
$\frac{1}{2}$ Keana	"	Koolau Loa	Oahu.

Ke ae aku nei au i keia mahele ua maikai.

No Kinimaka na Aina i kakauia maluna, ua ae ia'ku e hiki ke lawe aku imua o ka Poe Hoona Kuleana.

Hale Alii, Febr. 9, 1848.

KAMEHAMEHA.

A true translation of which is as follows :

" For Kinimaka.

The lands.	Ahupuaa.	Kalana.	Island.
Maihi	"	Kona	Hawaii.
Kalahiki	"	"	"
Onouli malo	"	"	Molokai.
$\frac{1}{2}$ Keana	"	Koolau Loa	Oahu.

I hereby assent to this division. It is good.

To Kinimaka are the lands above written.

It is hereby allowed to take them before the Board of Commissioners.

Palace, Febr. 9, 1848.

KAMEHAMEHA.

173

Statement of Claim and Evidence.

Helu 129, Kinimaka.

WAHI E NOHO AI,
HONOLULU, Iulai 14, 1846.

Aloha oukou ka poe Hoona Kuleana mea Aina.

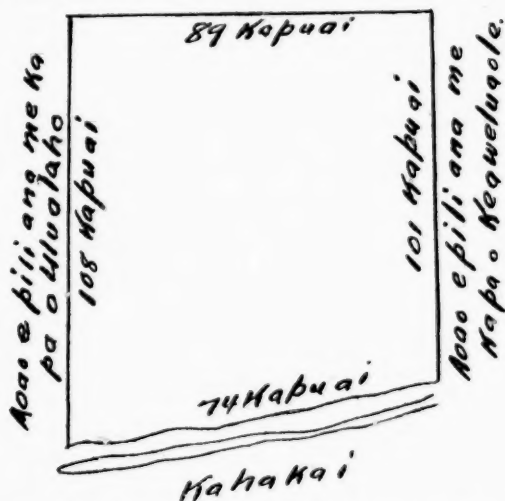
Eia mai ko'u mau pahale ma Honolulu nei, a me ko lakou mau kuleana e maopopo ai no'u keia mau pa. Aloha oukou.

Owau no me ka Mahalo ko oukou kauwa hoolohe,

KINIMAKA.

Kii 1.

Aoao mauka pili ana me ka pa o Wahinealii.

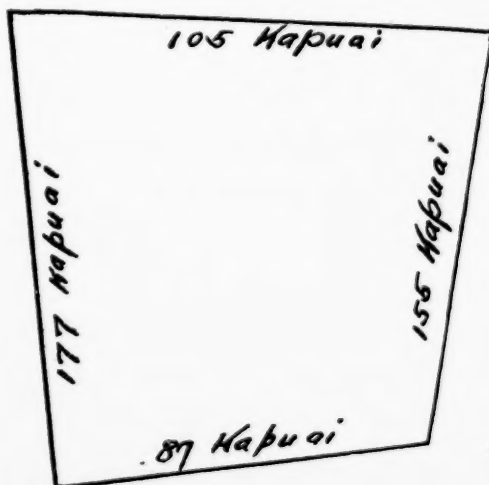


Eia ke kuleana o keia wahi, mai a Leleahano, a ia Hewahewa, a ia Kapiiwi, a ia Kinimaka.

KINIMAKA.

174

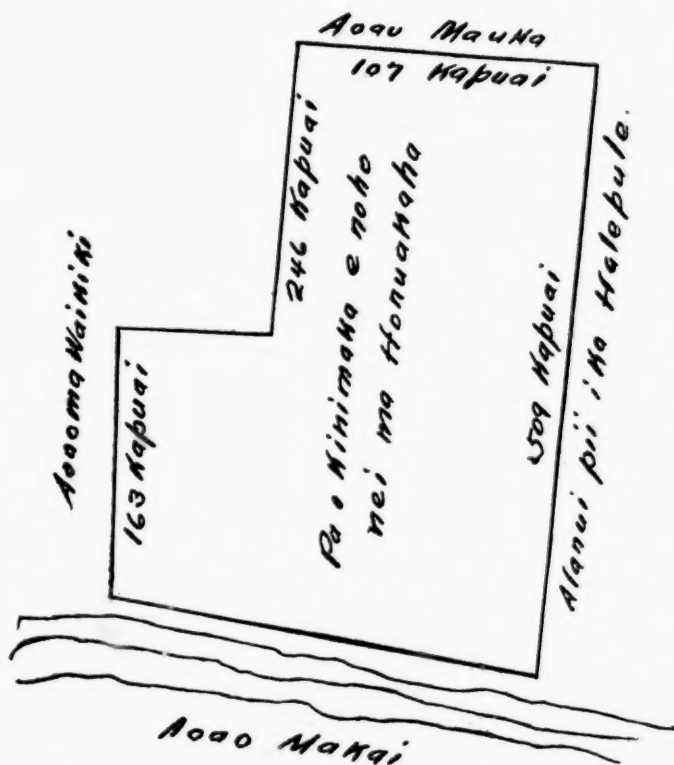
Kii 2.



Eia ke kuleana o keia wahi mai a Kauikeaouli a ia Kaniu, mai a Kaniu a ia Kinimaka.

KINIMAKA.

Kii 3.



Eia ke kuleana o ko'u pa, no Liliha mai ko'u o Kahikona ka hoike.

KINIMAKA.

of which a true translation is as follows:

175

Number 129, Kinimaka.

RESIDENCE,
HONOLULU, July 14, 1846.

Greeting to the Board for Quieting Land Titles.

These are my house lots at Honolulu and rights therein that it may be clear that these lots are mine.

Love to you, I am with a blessing, Your obedient servant,

KINIMAKA.

Diagram 1.

(Diagram.)

This is the right of property in this place. It is from Loleaheno to Hewahewa and to Kapiiwi and to Kinimaka.

KINIMAKA.

Diagram 2.

(Diagram.)

This is the right of property in this place. It is from Kanikea-rouli to Kaniu and from Kaniu to Kinimaka.

KINIMAKA.

176

Diagram 3.

This is the right of property in this lot. It is mine from Liliha. Kahikona is the witness.

KINIMAKA.

Endorsed: Circuit Court, 1st Circuit. In Equity. Kapiolai Est. Ltd., vs. Mary H. Atcherley. Amended Bill for Injunction. Filed April 16, 1902. A. G. Kaulukou, Clerk.

177

APPENDIX F.

Appendix F.

KAPIOLANI ESTATE, LTD.,

v.

MARY H. ATCHERLEY.

Appeal from Circuit Judge, First Circuit.

Submitted October 9, 1902; Decided April 7, 1903.

Frear, C. J., Galbraith, and Perry JJ.

If a decree is not clear or is ambiguous in its terms, it may be construed in the light of the averments and prayer of the bill and averments of the answer and of the remainder of the record.

A decree that A "as guardian of K. D. and M. "Minors, do convey to D. K. certain lands named, held, in the light of the pleadings and the remainder of the record, to be an order for the conveyance of the interests of the minors.

In a suit in equity brought to enforce a former decree of a court of equity, the respondent by demurrer questioned the validity and

the correctness of the original decree. Held, that the attack thus made is collateral and not direct.

Upon collateral attack, mere errors or irregularities cannot be taken advantage of.

A decree rendered in 1858, requiring a guardian to execute a conveyance of land of his awards, minors, upheld, although it appeared that in the original suit, the guardian as such, and not the minors, was named as the party defendant and that service of summons was made on the guardian as such and not on the minors themselves.

While upon a bill to carry a decree into execution, the court may re-examine the propriety of the original decree, still it is not bound to do so in all cases. Where no fraud is alleged in obtaining the original decree—declaring a trust and ordering a conveyance to the cestui que trust—and that decree is not incomplete, was adversary and not by consent, was rendered more than forty years prior to the request for re-examination and was followed during the whole of that period by sole and undisputed possession of the land by the complainant and his successors in interest, the decree should not be opened up.

Opinion of the Court by Perry, J. (Galbraith, J., Dissenting).

This is a bill to enforce a decree in equity rendered by the Honorable E. H. Allen, Chief Justice of the Supreme Court of Law and Equity of the Hawaiian Islands, in Chambers, on November 2, 1858, by which decree it was ordered "That Mr. Armstrong, as Guardian of Kinau, David Leleo and Kinimaka, minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this cause, the land named Omulimalo on the Island of Molokai and the first apana of land set forth in Royal Patent No. 1602 filed in this cause." The prayer is that the respondent be permanently enjoined from prosecuting an action at law instituted by her to recover possession of Apana 1 of R. P. 1602 L. C. A. 129, 178 and from bringing any other proceedings for the same purpose, and that she be decreed to be the trustee of all the right, title and interest of Kaniu, David Leleo, and Moses Kapaakea Kinimaka in and to the land described for the benefit of the complainant and as such trustee be ordered to convey all such interest to the complainant. A demurrer to the bill, on the ground that no cause of action was stated, was sustained pro forma and the bill dismissed. From that order the complainant appeals.

The main question is whether the respondent is bound by the decree of 1858. The essential facts, stated in detail in the bill are as follows:

On December 29, 1856, David Kalakaua filed a bill in equity in the court on this island then having jurisdiction in such matters, against one Kinimaka. In that bill he alleged, in substance that he was born in 1836, that prior to 1844 he lived with one Kaniu, a chieftess, as her adopted child according to the custom of the

country; that Kaniu was seized of certain rights, hereditary and other, in certain named lands, about thirteen in number, situate within the kingdom and including that of Onoulimaloo, Molokai, and the apanas, house-lots in Honolulu, described in L. C. A. 129; that Kaniu died in 1844 leaving her husband Kinimaka, the respondent, but no issue; that on the day of her death Kaniu made an oral will, good according to the custom of the country, whereby she appointed the complainant her heir and left to him all her property; that during the session of the Board of Land Commissioners to Quiet Land Titles, Kinimaka procured to be awarded to himself four of the lands named, including the house lots in Honolulu. Certain other facts were also set forth by virtue of which Kalakaua claimed that Kinimaka held the legal title to the lands in trust for him and a decree was prayed for declaring such trust.

Upon the filing of that bill a summons in the ordinary
179 form was issued and served upon Kinimaka. The latter, however died on January 24, 1857, without having answered the bill. On March 16, 1857, under the title of the original suit, Kalakaua filed a suggestion of the death of Kinimaka and of his leaving "as heirs by will" his three minor children, Kaniu, D. Leleo and Moses Kapaakea, and prayed that the heirs be made parties to the bill, that a guardian ad litem be appointed for them and that a time be set for the further hearing of the cause.

March 6, 1858, Kalakaua filed a petition in probate for proof of Kaniu's oral will and for his appointment as administrator of her estate. At the petitioner's request a guardian ad litem was appointed to represent the three minors in that proceeding and citation was issued to Pai, widow of Kinimaka, and George E. Beckwith as administrator of the latter's estate and also as guardian ad litem of the minors. Further proceedings having been had, the probate court, on May 3, 1858, gave judgment to the effect that the verbal will was duly proven and that letters testamentary thereon be issued to Kalakaua.

Upon petition of Pai, filed April 24, 1858, Richard Armstrong was appointed administrator of the estate of Kinimaka in place of G. E. Beckwith, resigned, and guardian of the persons and property of Kaniu, David Leleo and Kinimaka, the minors.

On July 19, 1858, a bill in equity was filed by Kalakaua averring substantially the same facts as were set forth in the bill of December 1856, adding however, an averment of the probate of the will of Kaniu, and praying for similar relief; but of the lands described in the earlier bill a part only, to wit, two house lots awarded by L. C. A. 129, R. P. 1602, and the ahupuaa of Onoulimaloo L. C. A. 7130, was made the subject of the later one and a taro patch at Kaaleo, Oahu, L. C. A. 7130, not referred to in the first bill was included in the second. The concluding portion of the bill of 1858

180 read: "And your orator would further represent, that the said Kinimaka, at the time of his decease, left a widow, by name Pai, and minor children by name Kaniu, David Leleo and Kinimaka, who by law succeed to the rights of the said Kinimaka, for

which said children R. B. Armstrong, D.D., has been appointed guardian. And your orator, respectfully representing that he can have no remedy in the premises, except in a court of equity, humbly prays that the said Pai and the guardian of the said children, may be summoned to show cause, at such time and place as may be most convenient for your Honorable Court why it should not be decreed that the lands, hereinbefore mentioned, of right belong to your orator. And your orator further prays that it may be decreed that the said Kinimaka did, during his lifetime, procure the award, and hold possession of the before mentioned lands, for the use and benefit of your orator, and further that the said R. B. Armstrong, guardian of the said minor children of the said Kinimaka may be ordered to convey to your orator all the right, title and interest of the said children in the aforesaid lands; and further that the aforesaid Pai, widow as aforesaid of the said Kinimaka, deceased, may be ordered to convey to your orator, all her right, title and interest in and to the above enumerated lands. And that such other orders and decrees may be made and passed in the premises, as may pertain to equity and good conscience and may give relief to your orator in the premises." The process issued required the Marshal to summon "Pai(w) and Richard Armstrong (Guardians of Kaniu, Leleo and Kinimaka, minors) defendants," to appear, etc. Service of this summons was made upon Pai and upon Richard Armstrong.

To the bill of 1858 an answer was filed entitled "The Joint and Several Answers of Pai and Richard Armstrong, Guardians of Kaniu, David Leleo and Kinimaka, minors, Defendants, to the Bill of Complaint of David Kalakaua" and signed "Pai, Richard Armstrong Guardian of Kaniu, David Leleo, Kinimaka, minors.

181 By Asher B. Bates, their Solicitor." But very little was admitted in this answer. Ignorance was expressed as to the truth of the main averments and the complainant was left to his proof of the same. It was, however, stated by the respondents as their belief that if the awards were wrongfully issued to Kinimaka, they were issued upon testimony produced to the Board of Commissioners to quiet land titles which satisfied that Board that Kinimaka was entitled to such awards.

At the trial, counsel for the respondents presented the view that, assuming that the land originally belonged to Kaniu, and that she attempted to pass it by will to Kalakaua, nevertheless the King cognizant of these facts took back at the time of the great division his title to the land and thereafter, through the Board of Land Commissioners, made a re-distribution and gave an award covering these lands to Kinimaka and none to David and that, no appeal having been taken from the award, the latter was final and the complainant was estopped from re-examining the matter. Decision was reserved by the court. Thereafter, on November 2, 1858 the complainant filed a discontinuance of his suit except in so far as the same related to the land of Onoulimaloo, Molokai, and Apana 1 of R. P. 1602, and on the same day the final decree now sought to be enforced was made.

Kinimaka by will left his property to Kaniu for life, after him to David Leleo for life and after him the remainder in fee to Moses Kapaakea who was sometimes called Kinimaka in the proceedings under review. David Leleo died before Kaniu and Moses Kapaakea survived the two others. The defendant now holds by purchase from Moses Kapaakea, whatever title the elder Kinimaka had to the land. The complainant is likewise the successor to all of the rights of D. Kalakaua in the property, Richard Armstrong is now dead.

A question of lesser importance in the case may be disposed
182 of first, and that is, concerning the construction of the decree. It is contended that the decree does not require a conveyance of the interest of the minors in the land or the giving of a deed in their name by the guardian. If the decree is not clear or is ambiguous in its terms, it may be read in the light of the averments and prayer of the bill and averments of the answer and of the remainder of the record. See *Clay v. Hildebrand*, 34 Kan. 694 (9 Pac. 466) *Finnigan v. Manchester* 12 Ia. 521, 2; 5 *Encycl. Pl. & Pr.* 1064; *Freeman on Judgments* 45; 1 *Black on Judgments* 123. So read, there can be no doubt, it seems to us, that it was the intention of the court to order the conveyance of the interests of the minors. In our opinion that intention is sufficiently expressed in the decree.

The main contention in support of the demurrer is that the minors were not bound by the decree of 1858, because they were not themselves named as parties defendant in the suit.

In *Meek v. Aswan*, 7 Haw. 750, it was held that an action to recover rent due for use of a minor's land should be brought in the name of the minor by her guardian and not in the name of the guardian as such. The court said inter alia: "In the case at bar, a guardian for the minor had been appointed by the Probate Court. How, then, should the suit be brought? The purpose of it was to collect rent due for use of the minor's land. It was the suit of the minor, and not that of the guardian. But the minor cannot make a contract with an attorney to bring a suit, and cannot personally bring a suit; therefore, he must act through some one, or by some one especially appointed by the court. The suit nevertheless is that of the minor.

"Analogous to this is a suit where the suitor is represented by an attorney in fact. The principal brings the action by the attorney in fact." It may be that this is the better rule, that it should
183 apply as well to actions against minors, that the weight of modern authority elsewhere is in support of this view and that such is the practice at the present day in this Territory. But, however, that may be, we think that if, as contended for by the complainant, the contrary practice prevailed in our courts prior to the decision in the *Aswan* case, and the proceedings in *Kalakaua v. Armstrong*, *Guardian*, and *Pai* were in accordance with that practice the decree sought to be enforced should be held good and binding as against the minors.

In *Meek v. Aswan*, the court recognized the prior existence of a

different practice. It said: "We are aware that a different practice has in many instances been followed in this court without objection, and suits have been instituted in the form of A. B. guardian of C. D."

At the time of that decision (1889) the five members of the Supreme Court sat singly at nisi prius, exercising the jurisdiction and powers now vested in our Circuit Judges, and were therefore in a position to know what the practice in such matters was; and in this connection the ruling of Mr. Justice McCully, of the Supreme Court, who presided at the trial before the jury, is of great significance. The case had been instituted in the District Court of Honolulu where judgment had been rendered for the plaintiff. On appeal, after the jury had been empanelled and sworn and the plaintiff had opened the case, the defendant's counsel moved to dismiss on the ground that the action had been improperly brought in the name of the minor by her guardian and should have been brought by "G. S. Houghtailing, guardian of Eliza Meek." So thoroughly imbued with the past practice was the presiding justice who afterwards joined in the decision sustaining the exceptions, that he held the declaration defective in respect to the party plaintiff and granted the motion to dismiss. It is interesting to note, in passing, that in the Aswan case the court said that the objection to the complaint, even if tenable, should not have been visited with a dismissal, but that an amendment should have been allowed—

184 in other words, that the error, if any, was at most a mere irregularity and not one affecting the validity of the proceedings.

Formerly, by the common law of Hawaii, guardians possessed and exercised the absolute right to dispose of the real and personal estate of their wards, as might suit their own will. See preamble to Act of August 4, 1851. (Laws of 1851, p. 63): *Laanui v. Puohu et al.* 2 Haw. 161, 162; *Thornton v. Bishop*, 7 Haw. 431, 434, 435; *Hoare v. Allen* 13 Haw. 257, 261. It is not to be wondered at that the view as to the title of a guardian in the land of his ward and as to his powers generally growing out of those conditions, had not changed to any great extent during the few years next succeeding the enactment of the law of 1851 which abridged the rights and powers of guardians.

An examination of the records in some old cases referred to at the argument bears out the statement made in the Aswan decision as to the earlier practice.

In Law Cast No. 627, 1856 and 1857, an action of ejectment Kalama the plaintiff, alleged in her declaration that Kekuanaea and Li "have wrongfully entered upon" certain land described "—as you—petitioner understands claiming to hold the same on behalf of H. R. H. Victoria Kamamalu—but whether this last averment be true or not complainant does not of herself know." There was no other allegation in the least tending to establish a case against Victoria Kamamalu or from which the inference might be drawn that the two men were being sued as guardians of Victoria. The two answered, and Victoria filed a motion which *which* was granted "that the cause may be discharged as against her, as the petitioner

alleges no cause of action against her to which she can plead." Concerning this motion the clerk in his minutes says that "Mr. Bates moved that Victoria's name be stricken out as it was not pretended that she had any control over it, but merely her guardians for her benefit." This is the first reference to the two defendants as
 185 guardians but from the remainder of the record it is apparent that it was regarded both by court and counsel that the defendants were being sued as guardians and in the title of the court's decision and of the appeal they are named as guardians. By stipulation of the parties, the court tried and determined the question of right and title to the land, that of damages to be submitted later, if necessary, to a jury or to referees, it being, however, the ward's right and title, and not that of the two men who were guardians, that was involved.

Ikalia (k) guardian of Kanakaokai Aikaula (k) v. Kopaea and others 1879, (Law No. 1463) Neil Campbell, Guardian of the persons and property of Kaua (k) Ana (w) and Kamaka (k) minors and Emilia (w) and Neil Campbell, her husband, v. Manu, et al., 1881 (Law No. 1277) Naweli, Guardian of four minors named, v. Mary A. Auld and husband, 1881 (Law No. 1805) and A. F. Judd and S. B. Dole, Guardians of Airene H. Li, a minor v. Kuanalewa, et al., 1881-1882 (Law No. 2032) were all actions of ejectment in which the title of the wards was tried and determined. In each case the guardian as such was named as the plaintiff, and not the ward by the guardian. So, too, in Equity case No. 568, tried in 1886 and 1887, the bill and all subsequent papers, including two decisions by Mr. Justice Preston, were entitled "Yim Quon v. A. J. Cartwright, Guardian of George Holt and Annie Holt, defendant."

These cases, while but few in number, are sufficient to show a practice different from that declared in the Aswan case to be the correct one, and counsel for the respondent, diligent and thorough as he has been in this case, has referred to but one to the contrary. That is the case of Metcalf v. Metcalf, Equity No. 251, (1859) in which the bill, without title, prayed that Emma Metcalf, a minor, be ordered to convey to the complainant certain premises alleged to be held by her in trust for him. The clerk's minutes and the bill of costs are each entitled "Theophilus Metcalf v. Emma Metcalf"

and the decree of the court, as noted by the clerk, was that
 186 "the said Emma Metcalf, minor defendant, do release and convey through her guardian ad litem J. W. Austin, Esq."

On the other hand it may be noted that the complainant also prayed that "a guardian ad litem may be appointed by this Honorable Court who may be cited to appear and answer for the said Emma Metcalf and show cause if any there be why the prayer of this petition shall not be granted" that the order to the Marshal was to summon "J. W. Austin, Guardian ad litem for Emma Metcalf, defendant" that service was made as directed on the guardian, and that the respondent's answer was entitled "Theophilus Metcalf v. J. W. Austin, Guardian ad litem of Emma Metcalf" and signed by "J. W. Austin, Guardian ad litem of Emma Metcalf."

It is true in none of the cases cited by the present complainant

does it appear that the question was specifically raised. Yet from the very silence of court and counsel can be implied acquiescence in that mode of procedure and approval of it. "Where a court has erroneously held that certain things were sufficient to give jurisdiction and titles have been built thereon, the doctrine of stare decisis forbids the overruling of those decisions." Van Fleet, Coll. Attack, p. 4. Decrees rendered during the period in question extending from forty-five or more years ago to fifteen years ago, settling the titles to real estate and made in conformity with a procedure then regarded as good and impliedly decided to give jurisdiction to the court and to bind the wards, should be now upheld, irrespective of any later change in procedure and even though the lawyers and judges of today think differently as to the correctness of the former practice.

If the defects complained of can be regarded, not as matters affecting the jurisdiction but as constituting at most mere error, certainly such error cannot be taken advantage of in this case

187 because the attack now made on the decree of 1858 is collateral and not direct. "A collateral attack is an attempt to impeach a judgment or decree in a proceeding not instituted for the express purpose of annulling, correcting or modifying such judgment or decree"—17 Am. & Eng. Ency. Law 2nd ed., 848. See also *Morrill v. Morrill* 20 Or. 96, 101 *Nichols v. Smith* 26 N. H. 298, 300. "The word 'collateral' in this connection, 'is always used as the antithesis of 'direct' and it is therefore wide enough to embrace any independent proceeding. To constitute a direct attack upon a judgment, it is said, it is necessary that a proceeding be instituted for that very purpose. If an appeal is taken from a judgment, or a writ of error, or if a motion is made to vacate or set it aside on account of some alleged irregularity the attack is obviously direct, the sole object of the proceeding being to deny and disprove the apparent validity of the judgment. But if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral and falls within the rule" 1 Black on Judgment, Sec. 252. "A direct attack on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law. A collateral attack on a judicial proceeding is an attempt to avoid defeat, or evade it, or to deny its force and effect in some manner not provided by law." Van Fleet, Collateral Attack, pp. 4, 5. Under either of these definitions,—we have not found any essentially different—the present attack is collateral. The complainant's bill has for its sole object the enforcement of the decree and necessarily proceeds on the assumption that that decree is not made in any manner provided by law nor in a proceeding instituted expressly for that purpose. "An attack on a judgment in a proceeding to revive it is a collateral attack."—*Sharon v. Terry*, 36 Fed. 337, 346. See also 1 Black on Judgments, Sec. 252.

188 Service of summons in the case of *Kalakaua v. Armstrong* was made on the guardian and not on the minors themselves. The same procedure was followed in *Metcalf v. Metcalf* and in *Yim*

Quon v. Cartwright, and is not unsupported by precedents elsewhere or in reason. The minors in this case were, in 1858, about eleven, seven and one year old respectively. Service on them would be, in reality, a worthless form. After service it is the guardian who acts and who conducts the whole defense, the ward does nothing and can do nothing. True, in theory, such service would serve to notify their parents or others standing in loco parentis of the institution of the suit. That purpose was in fact accomplished in this case for their mother, Pae, was herself a defendant and the guardian appointed at her request was also served. General guardians are by our statute, Section 1970, C. L., authorized and required to "appear for and represent" the ward "in all legal suits and proceedings, unless where another person is appointed for that purpose, as guardian or next friend." A guardian might, perhaps, under this provision, waive service upon a minor defendant and enter an appearance and thereby bind the minor. That there is a difference of authorities as to whether a judgment against a minor without service on him is absolutely void for want of jurisdiction or is merely voidable and so immune from collateral attack, is conceded by respondent. The point as to lack of service is relied upon by her only to the extent of showing that for that reason the decree was erroneous and should not be now enforced.

The old decree is claimed by respondent to be erroneous for the further reason that upon the facts and the evidence adduced in that proceeding in 1858, the court erred in holding that Kinimaka, and after him his heirs, was a trustee of the legal title for the benefit of Kalakaua. The contention of the respondent is that because of these two alleged errors last mentioned to wit, the lack of service and upon the merits, the court should refuse to enforce the decree.

189 It is not contended that the court must in all such cases re-examine the former proceeding but merely that it may, in its discretion, do so. Assuming that to be so, we decline to re-try the old case. The guardian appeared and contested the complainant's claim, presenting in opposition substantially the same views now sought to be urged by the respondent. The ward's interests were not permitted to go by default but were fully defended by counsel. The decree, while not carried out by the execution of a conveyance, was in fact acquiesced in, as appears by the bill by all concerned and complainant and his successors in interest from that time continuously until about January, 1900, held open, notorious and undisturbed possession of the land. Under the circumstances, and after a lapse of forty-four years, we do not think that the court should examine into the merits of the former proceedings or refuse to enforce the decree for the reasons suggested.

As to whether the bill of 1858 was a continuation, by revival of the proceedings instituted in 1856, or was the commencement of a new and independent suit, we express no opinion.

The decree appealed from is reversed and the cause remanded to the Circuit Judge for such further proceedings as may be proper.

KINNEY, BALLON & McCLANAHAN AND
H. A. BIGELOW,

For the Complainant.

L. A. DICKEY, *For the Respondent.*

Concurring Opinion of Frear, C. J.

I concur in general in the reasoning and conclusions of the foregoing opinion.

It is true, as held in *Lawrence Mfs. Co. v. Janesville Mills*, 138 U. S. 552, that "where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill,"

190 but that does not mean that the former decree should be opened up in all cases. As a rule it is not opened up where, as here, so long a time has elapsed since it was made and where no fraud is alleged in obtaining it and where it is not incomplete and where it was adversely and not by consent. The case just cited from the Federal Supreme Court was brought to piece out a decree that was both incomplete and by consent. As the court said "The prior decree was the consequence of the consent and not of the judgment of the court, and this being so the court had the right to decline to treat it as *res adjudicata*." And in *Buchanan v. Knoxville & O. R. Co.* 71 Fed. Rep. 324, the United States Circuit Court of Appeals for the Sixth Circuit distinguished that case, and after pointing out that it was a case to piece out an incomplete consent decree and quoting from it the language above quoted herein, said "That is a very different case from that of a party who stands on a complete decree, and seeks no other benefit or advantage than that which is due by the general law from a former judgment." in the present case it would be practically impossible, owing to lapse of time and the deaths of witnesses, to go into the merits of the former decree, and the plaintiff and its predecessors have been in possession and enjoyed the benefits of that decree without question for more than forty years.

The question whether the guardian or the minors should have been made parties and served in the former case can hardly be said to be involved. We may assume not only, as was perhaps held by implication in *Meek v. Aswan* 7 Haw. 750, that it would have been correct practice to have made the minors defendants and to have served them, but also that it was incorrect practice to make the guardian the party defendant and serve him alone. Still, if that is only a question of error, and not of jurisdiction, it cannot be raised on a collateral attack. There can be no doubt that this attack is collateral. The only question, therefore, is whether the court in the former case merely committed error or was entirely without jurisdiction, whether the decree was absolutely void or merely voidable on direct attack. The *Meek* case was 191 one of direct attack and the court seemed to intimate the *the* irregularity complained of, if well founded, was one of error rather than of jurisdiction. In *McAnear v. Epperson*, 54 Tex., 220, in which a judgment was attacked collaterally on the ground that it was void because no service had been made on the minor defendants, the court said: "After a careful and extended examination of many cases in addition to those cited by counsel, in which the judgments

in adversary proceedings, like the one now under consideration, were sought to be set aside because the minor defendants, although represented by guardians ad litem, had not been personally cited, we indorse this remark of Judge Hitchcock's in *Robb v. Irwin*; "Much is said in the books upon the subject. But I apprehend it will be found upon examination that decrees entered under such circumstances are generally, if not universally, holden to be voidable, not void." 15 Ohio 699; *Preston v. Dunn*, 25 Ala., 507; *Nelson v. Moon*, 3 McLean's C. C., 319; *Day v. Kerr*, 7 Mo., 426; *Sheldon v. Newton*, 3 Ohio St., 504.

We are of opinion, upon the weight of authority, that a failure to cite the minor defendants personally in suit No. 2103, they having been defended by a guardian ad litem, however sufficiently erroneous to have caused a reversal of the judgment against them on direct proceedings, was not such fatal defect as would render the judgment as absolutely void, so that it can be successfully impeached on a collateral attack." In *Dampier v. McCall*, 78 Ga. 687 (3 S. E. 563) the court went so far as to decline to interfere even on direct attack where service had been made on the guardian alone. See also as bearing on this general question, *Smith v. McDonald*, 42 Cal. 484; *Lessee v. Lowe*, 18 Oh. 368; *McFarland v. Febiger's Heirs*, 7 Oh. 198; *White v. Albertson*, 14 N. C. 241; *Gotendorf v. Goldschmidt*, 83 N. Y. 112; *Doe v. Litherberry*, 4 McClean 442; *Ankeny v. Blackiston*, 7 Or. 407; *Jongsma v. Pfiel*, 9 Ves. 357; 192 Dan. Ch. Pl. & Pr. 444, note 6. It is true these cases relate to the question of service of process rather than to that of parties of record, but the former would seem to be the more important of the two questions. If the principle contended for is correct, it would seem quite as important that the minors should be personally served as that the defendant should be "A minor, by B guardian" instead of "B guardian, for A, minor." No instance has been cited in which a decree made under either of these circumstances has been held void on collateral attack. The question is not whether *Meek v. Aswan* shall be followed or whether the matter is *stare decisis* in view of the former practice. To hold that the question is one of error rather than of jurisdiction, and so that the decree is not subject to collateral attack, is in entire harmony with the decision in *Meek v. Aswan*; and former practice, as regarded in a number of the cases above cited, greatly emphasizes the propriety of upholding former decrees as far as possible under circumstances like the present.

Dissenting Opinion of Galbraith, J.

I do not concur in the argument or conclusion announced in the foregoing opinion.

The rule recognized by the Supreme Court of the United States, and absolutely binding on the Courts of this Territory, is that "where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as re-

spects the relief to be granted on the new bill." *Lawrence Mfg. Company v. Janesville Cotton Mill*, 138 U. S. 552, 561.

This rule clearly gave the trial court the power in hearing the bill to open up and re-examine the decree of 1858, and, it seems to me, that the possession of the power there was an implied duty to exercise it. Aside from this consideration a decree that has been permitted to remain dormant for 44 years needs a "clear bill of health" to enable the doctrine of *stare decisis* to be invoked in its behalf and to authorize a court after so long a time to decree its specific performance.

193 This decree of 1858 did not divest the respondent's grantor of the legal title to the property in dispute, nor did it pretend to do so. It merely ordered Armstrong, as guardian, to convey the property. This he did not do. Why we do not know. The fact that complainant and its grantor remained passive so far as this decree was concerned for all these years while the legal title to property was in another and took no step to force a conveyance of title under the decree is difficult to reconcile with the claim that they felt secure in the legality of the decree. I do not deem it necessary to go into the merits of this decree further than to state that there is sufficient on the face of the bill to raise a serious question in my mind as to its correctness.

I do not consider the claim well taken that the respondent and her predecessor in title "acquiesced" in this decree by the fact that no action was taken to have the same reversed or set aside. They were not compelled to take the initiative or to do anything, so long as no attempt to execute the decree was made. The decree was harmless to them so long as no attempt was made to enforce it. The burden of action was on the complainant. The legal title was in the respondents' grantor and so long as nothing was done to compel him or them to convey his, or their, inaction, cannot be said to be "acquiescence" to her prejudice.

The doctrine of *stare decisis* has been invoked in behalf of this decree. It seems to me that this doctrine will prohibit the granting of the prayer of the bill. Blackstone says relative to this doctrine, "for it is an established rule to abide by former precedents. Where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the

194 breast of any subsequent judge to alter or vary from according to his private sentiment; he being sworn to determine, not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one" 1 Blackstone 69.

I understand that it is the "former precedents" of this Court not the uncertain precedents of the Circuit Court (which can only be ascertained by a tedious search of the files of that Court) that this Court should "abide by" and that it is in this way that we may "keep the

scale of justice even and steady and not liable to waver with every new judge's opinion."

This court has decided in a suit by a minor to collect rent due that the action should be commenced in the name of the minor by its guardian. (*Meek v. Aswan*, 7 Haw. 750.) The converse of this proposition is that a suit against a minor should be against him by his guardian and not against his guardian alone. This is admitted so far as this case is concerned. "It may be that this is the better rule, that it should apply as well to actions against minors, that the weight of modern authorities, elsewhere is in support of this view and that such is the practice at the present day in this Territory." Notwithstanding this admission the decision in the *Aswan* case is not followed, nor is it overruled, in express terms, for the reason that a "contrary practice prevailed in our Courts prior to the decision in the *Aswan* case." This "contrary practice" may have been permissible prior to the decision in the *Aswan* case but that decision having declared the practice wrong we cannot now approve of such practice without overruling that case. That case ought not to be overruled for the reason that it is good law and is supported by the great current of judicial authority elsewhere.

Again what is the evidence of this contrary practice? No decisions were cited in this jurisdiction to support it. We are referred to the files of some seven or eight cases in the Circuit Court where

the papers are entitled as were those in the case in which the
195 decree in question was rendered. It is not contended that the correctness of the procedure was raised in any of these cases or that the ruling of a Circuit Judge supported it, but it is contended that there was an "implied Acquiescence" in the practice "from the very silence of the Court and counsel." So we have only the "implied acquiescence" of the Court and counsel in seven or eight cases in the Circuit Court extending over a period of thirty or forty years to support the majority of the Court in refusing to follow the decision of this Court rendered at a time when the Court was composed of five judges. This reasoning followed to its logical conclusion, it seems, would prevent this Court from overruling a practice or procedure of the Circuit Court no matter how erroneous provided "court and counsel" had by silence acquiesced in it in a few cases, extending over a number of years.

Again the practice of digging up the files of the Circuit Court and referring to them to establish a practice or procedure does not appeal to me very strongly. There is enough difficulty in determining such questions when reference is made to reported cases where the evidence of the question passed upon is supposed to be preserved in practicable form. To search through a lot of files of the trial court and examine the entitling of the papers and the endorsement on the summons is not in any way a satisfactory method to establish a question of procedure let alone to justify an appellate court in passing by one of its own solemn decisions.

The heirs of *Kinimaka* were the real parties in interest in the suit resulting in the decree of 1858 and sought to be enforced by the bill. These heirs were not made parties to that suit, were not

served with process therein and made no appearance although their guardian was a party, was served and appeared and contested the cause still the heirs were not parties and were not bound by the decree nor is the respondent in this case and the decree ought not to be enforced without a re-trial of the cause.

196 The decree sustaining the demurrer to the bill should be affirmed, and the appeal dismissed.

Endorsed: 1246. Supreme Court. Territory of Hawaii. Kapiolani Estate vs. Mary H. Atcherley. Decision. Filed April 7, 1903. (S.) George Lucas, Clerk.

197

No. 76.

LEWERS AND COOKE, LIMITED, Petitioner.

Certificate of Statement of Fact.

The above entitled cause after appeal from the Court of Land Registration having been remitted to the said Court by the Supreme Court of the Territory of Hawaii, with directions to set aside its former decree ordering that the title to the land in controversy be registered in the name of Lewers and Cooke, Limited, and to enter a decree denying the registration of such title, and the decree having been entered by this court so denying registration, and the petitioner having noted an appeal to the Supreme Court of the Territory of Hawaii, from the said final decree denying registration, in accordance with the decision of the Supreme Court of the Territory of Hawaii, and said appeal from the second decree being necessary as a preliminary step to securing an appeal from the Supreme Court of the Territory to the Supreme Court of the United States, the Court of Land Registration has prepared a statement of the facts of the case for the use of the Supreme Court of the Territory of Hawaii conforming with the requirements of the act of April 7, 1874 (18 Statutes at Large, 27).

I hereby certify that the foregoing statement is a true statement of the facts of the case as they appear from the record.

Honolulu, Sept. 25, 1908.

(Sig.)

P. L. WEAVER,

Judge Court of Land Registration.

Endorsed: S. C. N. 308. No. 76. Petition of Lewers & Cooke, Ltd. Statement on Appeal. Filed September 25, 1908, at 2:15 o'clock P. M. J. A. Thompson, clerk.

- 198 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

In the Matter of the Petition of LEWERS & COOKE, LTD.

Appeal from Court of Land Registration.

Argued January 18, 26, 1909; Decided January 28, 1909.

Hartwell, C. J.; Wilder and Ballou, JJ.

Appeal and error—second appeal.

The appeal of one party having been sustained and a new decree entered by the trial court, a motion to dismiss an appeal from the new decree is denied, it appearing that new points of law, although not raised by counsel, exist to the extent of requiring a modification of the decree.

Appeal and error—findings of fact by trial judge.

It is within the power of trial judges to make findings of fact, and such findings will not be stricken from the record on motion.

Registration of land titles—practice.

The petition for registration of a parcel of land having been denied in toto in consequence of an adverse claim to a portion of the parcel, this court, upon appeal, modifies the decree so that it shall be without prejudice to the claim to the uncontroverted portion.

199

Opinion of the Court by Ballou, J.

The decree of the court of land registration registering the title of Lewers & Cooke, Ltd., having been reversed upon the appeal of Mary H. Atcherley (In re Lewers & Cooke, Ltd., 18 Haw. 625; 19 Haw. 47), the court of land registration entered a decree denying the petition for registration. After entering the decree the judge of the court of land registration prepared and certified a statement of facts of the case. The appeal of the petitioner from the decree was submitted upon the briefs filed on the previous appeal, but counsel for Mrs. Atcherley interpose a motion to dismiss the appeal and a motion to strike the statement of facts from the files.

We see no ground for striking the statement of facts from the files. While it has been held that the circuit judges may refuse to make findings of fact (Waialua Agricultural Co. v. Oahu Railway and Land Co., 18 Haw. 81, 87), and the same is true of the court of land registration, yet the making and filing of such statements, whether done formally at the request of either party or embodied in the opinion of the court or judge, is frequently done as a matter of

practice and is of material assistance to the appellate court. In jury waived cases particularly it some times happens that the decision is so brief as to afford no clew as to the matters of law and fact passed upon, and that it is possible to support the decision upon a view of the facts which, while sustained by some of the evidence, is so completely contradicted by other testimony that it was in all probability not the real ground for the decision. The appellate court, while satisfied that in all probability the decision was based upon a true view of the facts and an erroneous application of principles of law, is obliged to sustain the decisions because there is some testimony to support an improbable view of the facts. We do not wish to discourage the practice of the trial courts in indicating either in their opinions or in separate findings the principal questions of law and fact passed upon. It would be better practice to have
200 findings filed prior to or contemporaneously with the decree, but we do not consider this material if they are filed before the record is sent to the supreme court. As to the point that the filing of such a statement in connection with a second appeal tends to render uncertain grounds of the decision heretofore rendered it would be observed that on appeal the whole record is before us and the statement of facts is merely an aid and not binding if contradicted in any particular by the rest of the record. The remarks in *Hutchins v. Bierce*, U. S. Supreme Court advance sheets, December 14, 1908, were relative to a case pending on bills of exceptions, where the entire case is not before the appellate court but the appellate court is confined to questions of law presented by the bill of exceptions and the record therewith.

The motion to dismiss the appeal is based upon the ground that the present decree was entered in conformity with the previous opinion of this court with no new trial or evidence, and that the points of law raised by the appeal were all decided at the former hearing.

While it is true that no new points were suggested by counsel the court did not consider itself at liberty to overlook the fact that under the present decree the petition, although covering land not in controversy, was denied in toto, and requested further argument on that point. Irrespective of the decision on this question the existence of a new point available to the petitioner on its appeal is fatal to the motion to dismiss.

Passing to the merits of the case, it will be observed that the first decree of the court of land registration was reversed and the case remanded for further proceedings in conformity with the opinion of this court. In *re Lewers & Cooke, Ltd.*, 18 Haw. 625, 640. The recital in the present decree that this court ordered that a final decree be entered by the court of land registration denying the petition to register that portion of the lands described in the petition by
201 Mary H. Atcherley is erroneous. We did not prescribe the form that subsequent proceedings should take, particularly in view of the fact that Mrs. Atcherley had attached to her answer a cross petition that a registered title be granted to her as to the part she claimed. The court in the present case, however, did not stop

with the construction thus put on our former decision but, without ordering a severance under R. L. Sec. 2417, denied the entire petition. In spite of the failure of counsel to press the point we do not think the decree should stand in this form. If the denial of the petition is final and binding as to the portion claimed by Mrs. Atcherley it might be held equally conclusive against the right to a registered title to the portion not in controversy. The decree should be modified by correcting the erroneous recital and by making the denial of the petition without prejudice to the right to obtain a registered title to the portion of the land not covered by Mrs. Atcherley's claim. Under the circumstances of the case this decree may be entered in this court. *Hind v. Wilder's Steamship Co.*, 13 Haw. 174.

Decree accordingly.

D. L. Withington and R. B. Anderson (Castle & Withington and Kinney, Marx, Prosser & Anderson on the briefs) for Lewers & Cooke.

L. A. Dickey and E. M. Watson for Mary H. Atcherley.

(Signed)

ALFRED S. HARTWELL.

(Signed)

A. A. WILDER.

(Signed)

SIDNEY BALLOU.

Indorsement: Supreme Court Territory of Hawaii. October Term, 1908. In the Matter of the Application of Lewers & Cooke, Limited. Opinion. Filed January 28, 1909, at 10 A. M. J. A. Thompson, Clerk.

202 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

In *the* Application of LEWERS AND COOKE, LIMITED, for the Registration of Title to Land.

Decree.

This case coming on to be heard upon appeal by Lewers and Cooke, Limited, from a decree rendered May 22, 1908, by P. L. Weaver, Judge of the Court of Land Registration of the Territory of Hawaii, and it appearing that said decree was erroneous in containing a recital that this court had ordered that a final decree be entered by the Court of Land Registration denying the petition to register that portion of the lands described in the answer of Mary H. Atcherley and in denying the entire petition:

It is hereby ordered, adjudged and decreed that the said decree of the Court of Land Registration be and it hereby is modified so as to read as follows:

The court finding that the petitioner, Lewers and Cooke, Limited, has no legal or equitable title to the land described as Lot 1 of Land Commission Award 129 Royal Patent 1602, issued to Kinimaka, its petition for registration is denied without prejudice to its right

to obtain a registered title to all that land not covered by said Lot 1 of Land Commission Award 129, Royal Patent 1602.

By the Court,
(Signed)

J. A. THOMPSON, *Clerk.*

Honolulu, March 24, 1909.

Endorsed: Supreme Court, Territory of Hawaii. October Term, 1908. In Re Application of Lewers & Cooke, Limited, for Registration of Title to Land. Decree. Filed March 24, 1909, at 11:30 o'clock a. m. J. A. Thompson, clerk.

203 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

In the Matter of the Petition of LEWERS AND COOKE, LIMITED, a Corporation, for a Registered Title to Land.

From the Court of Land Registration.

Appeal.

The above named petitioner, Lewers and Cooke, Limited, a Corporation, conceiving itself aggrieved by the decision and decree made and entered on the 24th day of March, 1909, in the above entitled proceeding, does hereby appeal from said decision and decree; and prays that this appeal may be allowed for the reasons specified in the assignment of errors, and that a transcript of the record and proceedings, and papers upon which said decision and decree was made, duly authenticated, excepting that, instead of the evidence at large, a statement of the facts of the case shall be certified by this court, may be sent to the Supreme Court of the United States.

Dated, Honolulu, Territory of Hawaii, March 24th, A. D. 1909.

CASTLE & WITHINGTON,
KINNEY, MARX, PROSSER &
ANDERSON,

*Attorneys for Lewers and Cooke, Limited,
a Corporation, Petitioner.*

And now, to wit, on the 24th day of March, 1909, it is ordered that the appeal be allowed as prayed for.

[Seal Supreme Court, Territory of Hawaii.]

ALFRED S. HARTWELL,
*Chief Justice of the Supreme Court
of the Territory of Hawaii.*

204 Service of the within and foregoing appeal and citation and the receipt of a copy thereof, admitted this 24th day of March, 1909.

LYLE A. DICKEY,
E. M. WATSON,
Attorneys for Mary H. Atcherly.

205 [Endorsed:] Original. No. 308. Supreme Court, Territory of Hawaii, October Term, 1908. In the Matter of the Petition of Lewers and Cooke, Limited, a Corporation, for Registered Title to Land. Appeal. Filed and issued for service March 24, 1909, at 12:30 o'clock P. M. J. A. Thompson, Clerk. Returned March 24, 1909, at 3:30 P. M. J. A. Thompson, Clerk. Castle & Withington, Attorneys for Lewers & Cooke, L't'd.

206 In the Supreme Court of the United States.

In the Matter of the Petition of LEWERS AND COOKE, LIMITED, a Corporation, for a Registered Title to Land.

Appeal from the Supreme Court of the Territory of Hawaii.

Bond on Appeal.

Know all men by these presents: That Lewers and Cooke, Limited, a Corporation, and F. J. Lowrey and C. H. Cooke, all of Honolulu, in the Island of Oahu, Territory of Hawaii, are held and firmly bound unto Mary H. Atcherly in the full and just sum of One Thousand Dollars, to be paid to the said Mary H. Atcherly, her attorneys, executors, administrators or assigns, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 24th day of March, 1909.

Whereas, the above named Lewers and Cooke, Limited, a Corporation, has prosecuted an appeal to the Supreme Court of the United States, to reverse the decision and decree rendered in the above entitled proceeding by the Supreme Court of the Territory of Hawaii.

Now, therefore, the condition of this obligation is such that if the above named Lewers and Cooke, Limited, a Corporation, shall prosecute said appeal to effect and answer all damages and costs, if it shall fail to make such appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

LEWERS AND COOKE, LIMITED, a CORPORATION,

(Sg.) By its President, F. J. LOWREY. [SEAL.]
(Sg.) By its Treasurer, O. C. SWAIN. [SEAL.]

207 Approved by:

(Sg.) ALFRED S. HARTWELL,
Chief Justice of the Supreme Court,
Territory of Hawaii.

Endorsed: Original 621. No. —. Supreme Court United States. In the Matter of Petition of Lewers and Cooke, Limited, a Corporation, for Registered Title to Land. Bond on Appeal. Filed March 24, 1909, at 12:30 o'clock P. M. J. A. Thompson, Clerk. Castle & Withington, Attorneys for Lewers & Cooke, L't'd.

208 In the Supreme Court of the United States.

LEWERS AND COOKE, LIMITED, Appellant,
vs.
MARY H. ATCHERLY, Appellee.

Appeal from the Supreme Court of the Territory of Hawaii.

Assignment of Errors.

Now comes Lewers and Cooke, Limited, appellant in the above entitled action, and says that in the record of the proceedings in said action in the Supreme Court of the Territory of Hawaii there is manifest error in this, to wit:

1. That the said Supreme Court of the Territory of Hawaii erred in overruling appellant's appeal from the decision and decree of the Court of Land Registration of the Territory of Hawaii denying its application for the registration of a title to the land in controversy in said cause, and in modifying and affirming said decree as modified.

2. That the said court erred in its decision filed March 5, 1908, sustaining the appeal of the said Mary H. Atcherly from the decree of the Court of Land Registration registering the title of Lewers and Cooke, Limited, to the premises in controversy, and in reversing said decree and remanding the case for further proceedings in conformity with its opinion.

3. That the said court erred in denying the petition of the said Lewers and Cooke, Limited, for a rehearing of the decision set out in the last assignment of error, and in overlooking, in the
209 denial of said petition, controlling decisions and questions decisive of the cause.

4. That there is error in holding that the decision rendered in the cause on September 16, 1907, by the Court of Land Registration, and the evidence upon which it was based, do not show that Lewers and Cooke, Limited, have a legal title to the land described in Apana 1, L. C. A. 129, R. P. 1602 to Kinimaka, and are entitled to register their title thereto.

5. That there is error in holding that said decision of the Court of Land Registration rendered September 16, 1907, and the evidence upon which it was based, do not show that Lewers and Cooke, Limited, have, if not a legal title, an equitable title to the premises Apana 1, L. C. A. 129, R. P. 1602 to Kinimaka, and are entitled to register their title thereto.

6. That there is error in holding that said decision of the Court of Land Registration rendered September 16, 1907, and the evidence upon which it was based, do not show that Lewers and Cooke, Limited, as successor in interest to Kalakaua, have a legal title in the premises described, in that it will be presumed from the decree in Equity No. 155 rendered November 2, 1858, from the recital in the

mortgage from Kalakaua to Armstrong and the release of that mortgage, and from the continued possession of the premises by Kalakaua and his successors in interest, that a conveyance was duly made of the legal title as directed by the decree.

7. That there is error in holding that the decree of the Hon. G. H. Robertson, Justice of the Supreme Court of the Hawaiian Islands, admitting to probate the oral will of Lilia H. Kaniu on May 3, 1858, is not a binding and conclusive adjudication upon the respondent, Mary H. Atcherly, that David Kalakaua was, after the death of Kariu, down to and at the time of the award, beneficially entitled to the premises awarded and patented to Kinimaka and described as Apana 1, L. C. A. 129, R. P. 1602, and that Kinimaka held the same as his trustee and guardian.

8. That there is error in holding that the decree of the Supreme Court of the Hawaiian Islands made by the Hon. E. H. Allen, Chief Justice thereof, on November 2, 1858, in Equity No. 155, is not a conclusive adjudication between the parties that Kinimaka took the award and patent in question in trust, and that Kalakaua and his successors in interest, including these petitioners, were and are the equitable owners of the premises, as against Moses Kapaakea Kinimaka and his successor in interest, the respondent, Mary H. Atcherly, entitled to a conveyance of the legal title; that said decree is a complete and final decree, not subject to be reviewed or re-opened at this time and in this proceeding.

9. That there is error in holding that the decree of the Supreme Court of the Hawaiian Islands, in Equity No. 155, referred to, is not adversary in its character and entered by consent, was not entered upon a valid consideration, viz., the abandonment of the claims of Kalakaua to other lands claimed by the respondents in that action, and, that such a compromise, having been acted on and assented to for more than forty years, can be disturbed at this date and is not binding and conclusive upon the respondent, Mary H. Atcherly.

10. That there is error in holding that the decision of the Supreme Court of the Territory of Hawaii rendered in Equity Case No. 1246, Kapiolani Estate, Limited, v. Mary H. Atcherly, on April 7, 1903, is not an adjudication binding on said Mary H. Atcherly and conclusively determining as to her that the decision and decree in Equity No. 155 rendered on November 2, 1858, by the said Hon. E. H. Allen, Chief Justice of the Supreme Court of the Hawaiian Islands, is not binding and conclusive upon the parties to said action and Mary H. Atcherly as the successor of said parties.

11. That there is error in holding that the said decrees of the Hon. G. H. Robertson and the Hon. E. H. Allen, and said decision of the Supreme Court in the case of the Kapiolani Estate, Limited v. Atcherly, are not and each of them is not a rule of property.

laid down by the highest court of the jurisdiction in reference to the identical property in litigation here, and that under the facts found by the decision in this cause the rule of property therein laid down should not be followed and the title of the petitioners registered to the premises in dispute.

12. That there is error in holding that the decisions referred to in the last assignment of error need not be followed by the Supreme Court of Hawaii on the principle of *stare decisis*.

13. That there is error in denying the contention of appellant that the decision by the Supreme Court in the case of *Kapiolani Estate, Limited, v. Atcherly*, having been rendered on a stipulation and for the purpose of determining between the parties whether the decision in *Kalakaua v. Armstrong* rendered in 1858 was *res judicata* between the parties, and the parties having consented to the matter being determined in the present litigation, that case still pending, the opinion is the law of this case, should have been followed and the title of this petitioner registered.

14. That there is error in holding that the opinion and decision of the Supreme Court in *Kapiolani Estate, Limited, v. Atcherly* should not be controlled, limited or construed by any reference to the stipulation of parties referred to, in which stipulation

212 they agreed that the question of *res judicata* under the proceedings in the cases of *Estate of Kaniu* and *Kalakaua v. Pai and Armstrong* should be in said appeal "first adjudicated and settled," thereby determining whether further litigation between the parties hereto is necessary or not.

15. That there is error in denying the contention of appellant that Lewers and Cooke, Limited having bought on the faith of the decisions herein set forth, which were and had become part of the law of the land, and particularly the law of this land, were entitled to rely on said decisions and a decree should have been entered in accordance with the decision rendered by this court registering their title.

16. That there is error in holding that it is not a violation of the Constitution of the United States, it is not a taking of property without due process of law or the impairment of the obligation of a contract to hold that Lewers and Cooke, Limited, who bought their title relying on the faith of the decision by the Supreme Court of Hawaii rendered in the case of the *Kapiolani Estate, Limited, v. Atcherly* that the decree of Judge Allen rendered November 2, 1858, was a complete and binding adjudication on the respondent, Mary H. Atcherly, susceptible of being enforced, are not entitled to enforce said decree and register their title in this proceeding.

17. That there is error in holding that the courts of equity of the Hawaiian Islands had not in 1858, and have not had at all times, jurisdiction and authority to declare the awardee under a land commission award trustee for the one equitably entitled to the land so awarded under equities existing at the time of the award.

18. That there is error in holding that under the decision and evi-

213 dence in this case David Kalakaua was, and his successors are, not equitably entitled to the premises in contest here, and that the holder of the legal title under the Land Commission award does not hold the same as the trustee for him and his successors in interest, who were equitably entitled at all times to demand a conveyance of said title.

19. That there is error in holding that Moses Kapaakea and Kinimaka and his successor in interest, Mary H. Atcherly, have not been guilty of laches and are not now estopped to review or set aside the decision made in Equity No. 155 on November 2, 1858.

20. That there is error in holding that the petitioner had no right to rely on the decision in the Kapiolani Estate, Limited, v. Atcherly, 14 Haw. 651, because there was no decree and because the decision was on demurrer, which would be by no means conclusive as predicated the final determination, since the facts in this case are conceded to be the same as those presented in the bill demurred to; and that there is error in further holding that the petitioner was only entitled to rely upon the general principles of law announced.

Dated, Honolulu, March 24, A. D. 1909.

Respectfully submitted,

(Signed)

CASTLE & WITHINGTON,

(Signed)

KINNEY, MARX, PROSSER &
ANDERSON,

Attorneys for Appellant.

Endorsed: Original —, No. —. Supreme Court United States. Lewers & Cooke, Ltd., Appellant, vs. Mary H. Atcherly, Appellee. Assignment of Errors. Filed March 24, 1909, at 12.30 o'clock P. M. J. A. Thompson, Clerk. Castle & Withington, Attorneys for Appellant.

[Endorsed:] Lewers & Cooke, Ltd., v. M. H. Atcherly. Ass'g't of errors & other papers on appeal.

214 In the Supreme Court of the United States.

In the Matter of the Petition of LEWERS AND COOKE, LIMITED, a Corporation, for a Registered Title to Land.

Appeal from the Supreme Court of the Territory of Hawaii.

Citation on Appeal.

UNITED STATES OF AMERICA, ss:

To Mary H. Atcherly, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at the City of Washington, within sixty days from the date of this writ, pursuant to an appeal filed in the Clerk's Office of the Supreme Court of the Territory of Hawaii, in a cause wherein Lewers and Cooke, Limited,

a Corporation, is appellant, and you, Mary H. Atcherly, are appellee, to show cause, if any there be, why the judgment in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Alfred S. Hartwell, Chief Justice of the Supreme Court of the Territory of Hawaii, this 24th day of March, in the year of our Lord one thousand nine hundred and nine.

[Seal Supreme Court, Territory Hawaii.]

ALFRED S. HARTWELL,
*Chief Justice of the Supreme Court
of the Territory of Hawaii.*

215 [Endorsed:] Original. No. 308. Supreme Court, United States. In the Matter of the Petition of Lewers & Cooke, Limited, a Corporation, for Registered Title to Land. Citation on Appeal Filed and Issued for service March 24, 1909 at 12:30 o'clock P. M. J. A. Thompson. Returned March 24, 1909 at 3:30 P. M. J. A. Thompson Clerk. Castle & Withington, Attorneys for Lewers & Cooke, Ltd.

216 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

In the Matter of the Petition of LEWERS & COOKE, LIMITED.

Findings of Fact.

(1) The petitioner, Lewers & Cooke, Limited, is a corporation organized and doing business under the laws of the Territory of Hawaii.

(2) The contestant, Mary H. Atcherley, is a native Hawaiian and resident in the Territory of Hawaii.

(3) The petitioner filed a suit in the court of land registration on the 28th day of January, A. D. 1906, in which it claimed title in fee simple to a tract of land on the corner of Punchbowl and Queen Streets, Honolulu, Territory of Hawaii, described in land commission award No. 129, lot 1 thereof, containing an area of about two acres. Other land was included in the petition, the title to which depends upon other sources and is distinct from the title in controversy.

(4) That portion of the premises described in the petition which lies within the boundaries described in land commission award No. 129 issued to Kinimaka, having an area of two acres, became the subject of a contest between the petitioner, claiming the fee simple thereto, and Mary H. Atcherley, contesting its title to said portion of the land described in the petition and claiming title in herself in fee simple.

217 (5) The court of land registration found that the petitioner was the owner of the fee simple title of the premises in controversy and a decree for registration was issued, from which decree

Mary H. Atcherley appealed to the supreme court of the Territory of Hawaii upon questions of law. The supreme court reversed the decision of the court of land registration, and thereafter the said court of land registration entered a decree setting aside its former decree and denying registration to the petitioner.

(6) From this second decree the petitioner appealed to the supreme court of the Territory of Hawaii which modified said decree as follows:

"Decree.

"This case coming on to be heard upon appeal by Lewers and Cooke, Limited, from a decree rendered May 22, 1908, by P. L. Weaver, Judge of the Court of Land Registration of the Territory of Hawaii, and it appearing that said decree was erroneous in containing a recital that this court had ordered that a final decree be entered by the Court of Land Registration denying the petition to register that portion of the lands described in the answer of Mary H. Atcherley and in denying the entire petition:

"It is hereby ordered, adjudged and decreed that the said decree of the Court of Land Registration be and it hereby is modified so as to read as follows:

"The court finding that the petitioner, Lewers & Cooke, Limited has no legal or equitable title to the land described as Lot 1 of Land Commission Award 129, Royal Patent 1602, issued to Kinimaka, its petition for registration is denied without prejudice to its right to obtain a registered title to all that land not covered by said Lot 1 of Land Commission Award 129, Royal Patent 1602.

"By the Court,

"J. A. THOMPSON, *Clerk.*"

Honolulu, March 24, 1909.

218 (7) The value of the premises in controversy is more than \$5,000. The area of the premises described in the petition including the premises in controversy, is 2.31 acres. The entire premises are valued, for taxation purposes, at \$26,500 for the real property, excluding improvements.

(8) The controversy arose upon the following facts: In April 1849, the board of commissioners to quiet title to real property awarded the fee simple title of the premises in controversy and other lots to Kinimaka by Land Commission Award No. 129, of which Royal Patent No. 1602 was issued, the award and patent being set out in appendix A pp. 1-6.

(9) Kinimaka's application before the commissioners to quiet title to land alleges that he acquired title to the premises in controversy from one Liliha, the application being set out in the appendix pp. 79-84. The commission awarded the title to Kinimaka on this application.

(10) On December 29, A. D. 1856, David Kalakaua filed a bill in equity, in the court of land registration of Oahu having jurisdiction in such matters, against Kinimaka, the awardee under Land Commission Award No. 129.

In that bill he alleged in substance that he was born in 1836, that prior to 1844 he lived with one Kaniu, a chiefess, as her adopted child according to the custom of the country;

That Kaniu was seized of certain rights, hereditary and other, in certain named lands, about thirteen in number, situate within the kingdom and including that of Onoulimaloo, Mokolai, and the apanas (lots) house-lots in Honolulu, described in L. C. A. 129;

That Kaniu died in 1844, leaving her husband, Kinimaka, the respondent, but no issue;

That on the day of her death Kaniu made an oral will, good according to the custom of the country whereby she appointed the complainant her heir and left to him all her property.

219 That during the session of the board of land commissioners to quiet land titles, Kinimaka procured to be awarded to himself four of the lands named, including the house lots in Honolulu. Certain other facts were also set forth by which Kalakaua claimed that Kinimaka held the legal title to the lands in trust for him and a decree was prayed for declaring such trust.

(11) Upon the filing of that bill a summons in the ordinary form was issued and served upon Kinimaka. The latter, however, died on January 24, A. D. 1857, without having answered the bill.

(12) On March 16, A. D. 1857, under the title of the original suit, Kalakaua filed a suggestion of the death of Kinimaka and of his leaving as heirs by will his three minor children, Kaniu, David Leleo (father of Mary H. Atcherley) and Moses Kapaakea, and prayed that the heirs be made parties to the bill, that a guardian ad litem be appointed for them and that a time be set for the further hearing of the cause, the full record of which is set out in Appendix B pp. 7-13.

(13) On March 6, A. D. 1858, Kalakaua filed a petition in probate for proof of Kaniu's oral will and for his appointment as administrator of her estate. At the petitioner's request a guardian ad litem was appointed to represent the three minors in that proceeding, and citation was issued to Pai, widow of Kinimaka, and George E. Beckwith as administrator of the latter's estate and also as guardian ad litem of the minors. Further proceedings having been had, the probate court on May 3, A. D. 1858, gave judgment to the effect that the verbal will was duly proven and that letters testamentary thereon be issued to Kalakaua, the record of which is set forth in Appendix C pp. 14-33.

(14) Upon petition of Pai, filed April 24, A. D. 1858, Richard Armstrong was appointed administrator of the estate of Kinimaka in place of G. E. Beckwith, resigned, and guardian of the persons and property of Kaniu, David Leleo and Kinimaka, the minors.

220 (15) On July 19, A. D. 1858, a bill in equity was filed by Kalakaua averring substantially the same facts as were set forth in the bill of December, 1856, adding, however, an averment of the probate of the will of Kaniu, and praying for similar relief; but of the lands described in the earlier bill a part only, to wit, two house lots awarded by Land Commission Award No. 129, Royal

Patent No. 1602, including the land in controversy and the ahupuaa of Onoulimaloo, L. C. A. 7130, was made the subject of the later one and a taro patch at Kaaleo, Oahu, L. C. A. 7130, not referred to in the first bill was included in the second. The concluding portion of the bill of 1858 read: "And your orator would further represent that the said Kinimaka, at the time of his decease, left a widow, by name Pai, and minor children by name Kaniu, David Leleo and Kinimaka, who by law succeed to the rights of the said Kinimaka, for which said children R. B. Armstrong, D. D., has been appointed guardian. And your orator, respectfully representing that he can have no remedy in the premises, except in a court of equity, humbly prays that the said Pai and the guardian of the said children, may be summoned to show cause, at such time and place as may be most convenient for your Honorable Court, why it should not be decreed that the lands hereinbefore mentioned of right belong to your orator. And your orator further prays that it may be decreed that the said Kinimaka did, during his lifetime, procure the award, and hold possession of the before mentioned lands, for the use and benefit of your orator, and further that the said R. B. Armstrong, guardian of the said minor children of the said Kinimaka, may be ordered to convey to your orator all the right, title and interest of the said children in the aforesaid lands; and further that the aforesaid Pai, widow as aforesaid of the said Kinimaka, deceased, may be ordered to convey to your orator all her right, title and interest in the above enumerated lands. And that such other orders and decrees

221 may be made and passed in the premises, as may pertain to equity and good conscience, and may give relief to your orator in the premises." The process issued required the Marshal to summon "Pai (w) and Richard Armstrong (Guardian of Kaniu, Leleo and Kinimaka, minors) defendants" to appear, etc. The service of this summons was made upon Pai and upon Richard Armstrong.

(16) To the bill of 1858 an answer was filed, entitled "The joint and several answers of Pai and Richard Armstrong, Guardians of Kaniu, David Leleo and Kinimaka, minors, defendants, to the Bill of Complaint of David Kalakaua" and signed "Pai, Richard Armstrong, Guardian of Kaniu, David Leleo, Kinimaka, minors. By Asher B. Bates, their Solicitor." But very little was admitted in this answer. Ignorance was expressed as to the truth of the main averments, and complainant was left to his proof of the same. It was, however, stated by the respondents as their belief that if the awards were wrongfully issued to Kinimaka, they were issued upon testimony produced to the board of commissioners to quiet land titles which satisfied that board that Kinimaka was entitled to such awards.

(17) At the trial after evidence taken, on behalf of petitioner, counsel for the respondents presented the view that, assuming that the land originally belonged to Kaniu, and that she attempted to pass it by will to Kalakaua, nevertheless the King, cognizant of these facts, took back at the time of the great division his title to the land and thereafter, through the board of land commissioners, made a redistribution and gave an award covering these lands to Kinimaka

and none to David, and that, no appeal having been taken from the award, the latter was final and the complainant was estopped from re-examining the matter. Decision was reserved by the court.

(18) Thereafter, on November 2, A. D. 1858, the complainant filed a discontinuance of his suit except in so far as the same related to the land of Onoulimaloo, Molokai, and Apana 1 of R. P. 1602, being L. C. A. 129, and on the same day, the final decree was rendered.

222 (19) By that decree it was ordered "that Mr. Armstrong, as Guardian of Kaniu, David Leleo and Kinimaka, minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this cause, the land named Omulimalo, on the Island of Molokai; and a first apana (lot) of land set forth in Royal Patent No. 1602 filed in this Cause," the full record, including the evidence, being set out in appendix D pp. 34-52.

(20) The actual occupation of the premises from the earliest times is shown to be as follows:

It was shown in the evidence in suit of 1857 that

David Kalakaua, from some time prior to 1844, lived on the land with his adopted mother, Kaniu. After her death he continued to live on the premises; Kinimaka, the surviving husband of Kaniu, was living there also; David Kalakaua became of age about 1856; from 1857 until about 1870 there is no evidence of the actual occupation of the premises, nor of any change in its occupation; in 1858 said Richard Armstrong loaned to David Kalakaua \$450 upon the security of a mortgage given by Kalakaua covering the title to the premises in controversy, in which the premises are described as those "granted to said D. Kalakaua by a decree of the Chief Justice of the Supreme Court." In 1858 and 1867 David Kalakaua mortgaged the same premises to other persons. In 1868 D. Kalakaua caused the premises in controversy to be conveyed to his wife, Kapiolani. The testimony in this case shows that Kalakaua and his wife, Kapiolani, occupied the premises as a home from some time prior to 1870 up to 1874, when Kalakaua became King of the Hawaiian Islands, and thereafter he occupied the premises as his private home until he died in 1891. Thereafter Kapiolani occupied the premises until she died in 1898. Since her death the premises have been occupied by her grantees (nephews David and Jonah Kuhio, and those claiming through them. The premises are now in possession of Lewers & Cooke, Limited, petitioner in the court of land registration.

223 During this time there is no evidence of any adverse occupation or possession of the premises by Kinimaka, or any heirs of Kinimaka or those claiming under them. David Leleo. Kinimaka and Moses Kinimaka, sons of Kinimaka, the patentees, lived on the premises some of the time during Kalakaua's reign as Royal guards.

(21) The chain of title under which Mary Atcherley claims is as follows:

The original Land Commission Award No. 129, issued April 10, 1849, and Royal Patent No. 1602, issued August 30, 1853, based

thereon, was issued to Kinimaka. Kinimaka died in 1857 and by his will the premises in controversy were devised to Kaniu Kinimaka, a daughter, for her life, and after her death to David Leleo Kinimaka, a son, for his life, and after his death to Moses Kinimaka, a son, the remainder in fee simple. In 1880 Kaniu conveyed all her interest in the premises to David Leleo Kinimaka and died in 1901. In 1884 David Leleo Kinimaka died, leaving him surviving several minor children; among others, Mary Atcherley, born in 1874. In 1897 Moses K. Kinimaka, the remainder-man conveyed his interest to Mary Atcherley for a consideration of \$50.

(22) In 1901 Mary Atcherley brought suit at law in ejectment for the possession of these premises in the circuit court of the first circuit, Territory of Hawaii, having jurisdiction thereof, against the Kapiolani Estate, Limited, then in possession.

(23) This action was enjoined by a complaint and a writ of injunction based thereon issued out of the circuit court of the first circuit, Territory of Hawaii, by a judge thereof having jurisdiction thereof, in a suit in equity, wherein the Kapiolani Estate, Limited, asked that an injunction issue and that Mary Atcherley be declared to be a trustee for the petitioner, the Kapiolani Estate, Limited.

An answer was filed by the defendant, Mary Atcherley denying the principal allegations of the complaint.

224 Thereafter a stipulation was entered into by the Kapiolani Estate, Limited, and Mary Atcherley, providing in substance that inasmuch as both parties wished to have the question of res judicata under the proceedings in equity set up in a proposed amended bill of complaint adjudicated and settled before proceeding further, thereby determining whether future litigation between the parties was necessary or not, they agreed, with the consent of the court, in order to effectuate the premises, that the petitioner might withdraw its bill and file the said proposed amended bill; that the defendant should withdraw her answer and file a general demurrer to the said amended bill of complaint setting up that said bill of complaint constituted no cause of action and that the demurrer should be sustained pro forma and that plaintiff should appeal from said decree to the supreme court of the Territory.

In accordance with the stipulation the original bill and answer were withdrawn and the said amended bill filed. This amended bill sets up in substance the pleading and decree in the equity suit, by Judge Allen in 1858, the proceedings in connection with the probate of the oral will of Kaniu, and the actual possession of the premises in controversy by Kapiolani Estate, Limited, and their privies in title up to the date of the suit. The amended bill in full is set out in appendix E pp. pp. 53-84.

In further accordance with this stipulation a decree was entered sustaining the demurrer and dismissing the bill.

An appeal to the supreme court was taken.

On April 7, 1903, a decision was rendered by the supreme court of the Territory, which is set out in full in appendix F pp. 85-107.

After this decision the case was remitted to the circuit court of

225 the first circuit and the demurrer was overruled. A second demurrer was filed and overruled and an answer was filed putting in issue the title. The case is still pending in the circuit court. At this stage of the litigation, on May 29, 1905, the Kapiolani Estate, Limited, being in possession as successors in title to Kapiolani, for a consideration of \$35,000, conveyed to Lewers & Cooke, Limited, appellant herein, by warranty deed, almost all the premises described in Land Commission Award No. 129, and a lot described in Land Commission Award No. 729, having a total area of 2.31 acres. The improvements on the premises were assessed for \$10,000 in 1906.

In 1906 Lewers & Cooke, Limited, being in possession, brought an action in the court of land registration, naming Mary H. Atcherly as a defendant, who claimed title to certain parts of the premises described in the petition (and asking that title be registered in the name of the petitioner).

The parties then agreed to submit themselves to the jurisdiction of the court of land registration, notwithstanding an equity suit and suit in ejectment pending in the circuit court.

By the Court.

J. A. THOMPSON,
Clerk Supreme Court.

Dated Honolulu May 10, 1909.

226

APPENDIX "A."

Number 129, Kinimaka.

He has claimed as his certain premises at Honolulu on the ground that he received these premises in the year 1834, and has had undisturbed possession up to this time.

In these lands we award to Kinimaka a freehold estate less than allodial. Should he pay the government communication, a Patent will be issued to him in fee simple.

But it is proper for him to pay for the hearing and the deciding of the claim. Thus,

For advertising the claim in the newspaper.....	\$1.00
For recording the claim 2 pages.....	1.00
Wm. L. Lee. For the diagram.....	.50
J. H. Smith. For working the 24th day of October 1846	1.00
S. M. Kamakau. For recording the testimony of the witnesses 2 pp	1.50
Z. Kaauwai. For surveying one day.....	2.50
Ioane II. For recording50
For deciding the claim April 10, 1849.	2.50
	<hr/>
	10.50

These are the boundaries,
Survey by D. Kalanikahua.

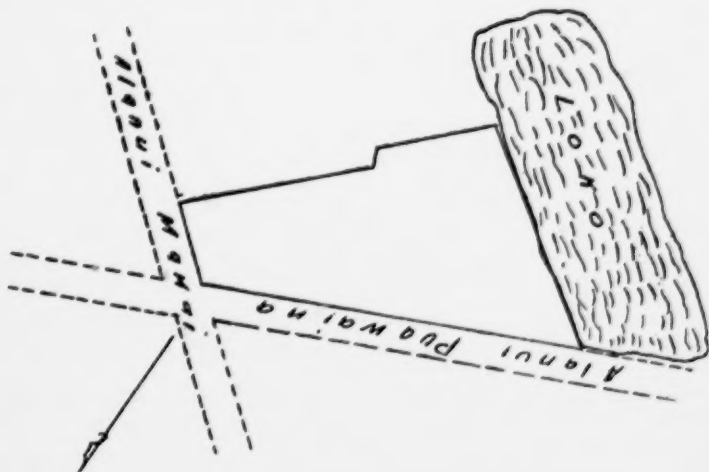
227

Lot 1.

Survey of a houselot of Kinimaka in Honolulu, Oahu, on the lower side of Makai St. and the south side of Punchbowl St. Beginning the survey at the south corner of the junction of Makai and Punchbowl Streets and running,

S. 68 W. 7 chains 42 $\frac{3}{12}$ feet to the upper sides of the fish pond of H. Kalama, adjoining Punchbowl St. turn and run along the upper edge of said pond S. 52 E. 4 chains 50 $\frac{2}{12}$ ft. to the West corner, of the lot of Ke adjoining the fish pond; turn N. 47 E. 2 chains 29 ft., turn N. 31 W. and run a little, 23 $\frac{9}{12}$ feet, turn N. 47 45' E. 4 chains 2 $\frac{8}{12}$ ft.; all these sides join the house lots of Ke; thence turn to place of beginning.

N. 49 15' W. 1 chain 39 $\frac{7}{12}$ ft. Area 2 acres 2 chains 28 fathoms, 15 feet.

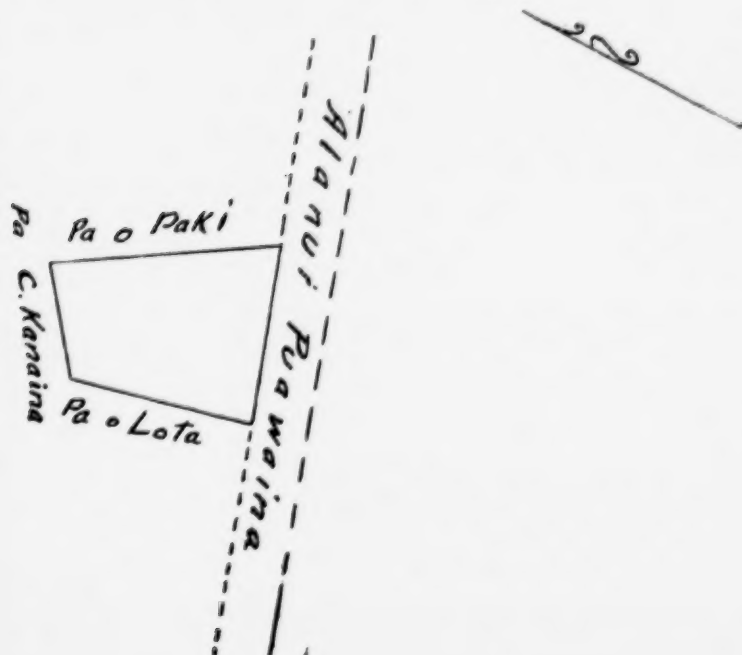


228

Lot 2.

Survey of a houselot of Kinimaka situate on the north side of Punchbowl St. and below the lot of Paki, and above the lot of Lota; Beginning the survey on the south corner of the lot of Paki, and the north side of Punchbowl St., the first side lies,

N. 35 30' W. 2 chains 45 $\frac{6}{12}$ ft. to the east corner of the lot of C. Kanaina turn S. 53 W. 1 chain 24 $\frac{5}{12}$ ft. to the north corner of the lot of Lota; turn S. 14 30' E. 2 chains to 18 $\frac{6}{12}$ ft. to the south corner of the lot of Lota; then turn to place of beginning. N. 68 15' E. 2 chains 15 $\frac{10}{12}$ ft. Area 545 fathoms 12 feet.

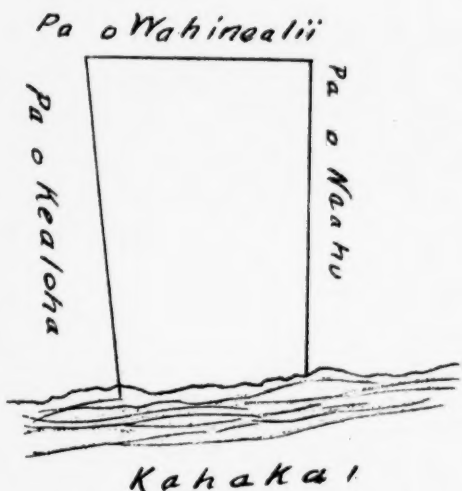


229 Lot 3.

The plan of the house lot of Kinimaka at Honolulu, Oahu, joining the beach which is makai of the lot of Wahinealii and Waikiki of the lot of Kealoha and Ewa of the lot of Naahu. Beginning the survey at the south corner of the lot of Kealoha adjoining the beach the first side lies,

N. 61 30' E. 1 chain 60 $\frac{9}{12}$ feet to the west side of the lot of Wahinealii; turn, S. 22 30' E. 1 chain 21 $\frac{9}{12}$ feet to the south corner of the lot of Wahinealii; turn S. 67 30' W. 1 chain 53 $\frac{6}{12}$ feet to the west corner of Naahu adjoining the beach; thence turn to place of beginning. N. 27 W. 1 chain 9 $\frac{3}{12}$ feet.

Area 278 fathoms 11 feet.



It is proper for him to pay for the hearing and deciding the claim thus,

For these lots, 2, 3..... \$10.50

230

Number 1602.

Royal Patent

Of the King in accordance with the report of the Land Commissioners.

Whereas the Board of Commissioners to Quiet-Land titles has awarded to Kinimaka by Award No. 129 a freehold estate less than allodial in the premises mentioned below, and,

Whereas, Kinimaka has paid into the government treasury eighty-two and 50/100 Dollars for the government's rights in said land,

Therefore by this Royal Patent Kamehameha III, the Great King over the Hawaiian Islands by the Grace of the Lord, shows to all men this day for himself and his kingly successors that he has conveyed and granted in fee simple to Kinimaka that land at Honolulu on the Island of Oahu with these boundaries.

Lot in Punchbowl St. commencing at the south corner of Queen and Punchbowl Streets and running; S. 68 W. 7 chains 42 3/12 feet to the upper side of the fish pond of H. Kalama adjoining Punchbowl St. thence along the upper edge of said pond; S. 52 E. 4

chains 50 $\frac{2}{12}$ ft. to the west corner of the lot of Ke; thence N. 47 E. 2 chains 29 ft. N. 31 W. 23 $\frac{9}{12}$ ft. and N. $47\frac{3}{4}$ E. 4 chains 2 $\frac{8}{12}$ ft.; all these sides join the houselot of Ke; thence N. $49\frac{1}{4}$ W. 39 $\frac{7}{12}$ ft. to commencement 2.52 acres.

231 Lot 2 on Punchbowl St. commence at the south corner of the lot of Paki and north side of Punchbowl St. and run; N. $35\frac{1}{2}$ W. 2 chains 45 $\frac{6}{12}$ — to the lot of Kanaina; thence S. 53 W. 1 chain 24 $\frac{5}{12}$ ft. to lot of Lota; thence S. $\frac{1}{4}$ E. 2 chains 15 $\frac{10}{12}$ ft. to place of commencement.

545 fathoms.

Lot 3 at Beach.

Commencing at the south corner of the lot of Kealaha adjoining the beach and running N. $61\frac{1}{2}$ E. 1 chain 60 $\frac{9}{12}$ ft. to the west corner of the lot of Wahine III, thence S. $22\frac{1}{2}$ E. 1 chain 21 $\frac{9}{12}$ ft. to lot of Noahu; thence S. $67\frac{1}{2}$ W. 1 chain 56 $\frac{6}{12}$ ft. along that lot to beach; thence N. 27 W. 1 chain 9 $\frac{3}{12}$ ft. to place of commencement.

278 fathoms.

Within these lots 3.20 acres more or less. All mineral and metal mines are reserved to the Government. This land is Kinimaka's. It is granted in fee simple to him, his heirs and devisees, subject however, to the tax laid by the legislature from time to time upon fee simple land.

In witness whereof I have put here my name and the great seal of the Hawaiian Islands this 30th day of August 1858.

Name: KAMEHAMEHA.

Name: KEONI ANA.

232

APPENDIX "B."

DAVID KALAKAUA

vs.

KINIMAKA.

To the Honorable the Chief Justice of the Hawaiian Islands, Sitting as a Court of Chancery:

Humbly complaining sheweth unto Your Honor, Your Orator, David Kalakaua of Honolulu, Oahu, Hawaiian Islands as follows:

That he, Your Orator, born on or about the — day of November A. D. 1836, in his early years and prior to the year 1844 lived with one Kaniu, otherwise called Haaheo, a female chief of this Kingdom as her adopted child, according to the then custom of the country being related to the said Kaniu as follows, viz: as the son of Kapaakea and Keohakalole, the great grandson and great grand daughter of Kamakaeheikuli, of which Kamakaeheikuli the said Kaniu was grand daughter. That as Your Orator is informed and believes and therefore avers, the said Kaniu was seized of certain

rights hereditary and other, in sundry lands situate within this Kingdom, to wit, in the lands of

Kukuluwaluhia.....	Kohala.....	Hawaii.
Peahi.....	Hamakualoa.....	Maui.
Aleamai	Hilo.....	Hawaii.
Wainuku	Kau.....	"
Kahilipali.....	"	"
233 Ponahawai	Hilo.....	Hawaii.
Kalaoa	Kona.....	"
½ Keana.....	Koolauloa.....	Oahu.
Maihi	Kona	Hawaii.
Kalaluki	"	"
Onoulimaloo		Molokai.
½ Keana	Koolauloa.....	Oahu.

and also certain houselots and small divisions of land in and near Honolulu, Oahu, viz: those described in the Award of the Board of Land Commissioners No. 129—confirmed by Royal Patent No. 1602 which rights as Your Orator is advised by counsel and believes, by the law of the land and the custom of the country descended to her heirs.

And Your Orator further showeth that the said Kaniu deceased during or about the year 1844, leaving no issue but a surviving husband Kinimaka by name and although owing to his tender years at that time Your Orator cannot of his own knowledge allege—yet he is informed and believes and therefore avers that at all times while in health and prior to her said decease, Kaniu did declare her intention to make your Orator her heir and that on the day of her decease and in immediate expectation thereof, and in the presence of several high chiefs of this Kingdom, to wit: of M. Kekuanaoa and others competent witnesses thereto, she did solemnly nominate and appoint Your Orator, being then an infant as aforesaid to be her heir,—and that then and thereafter, Your Orator, was by the then King, Kauikeaouli, Kamehameha III, and by the high chief of the Kingdom, regarded as the lawful heir to the property of Kaniu aforesaid.

234 And Your Orator further showeth unto Your Honor, that on the said decease of Kaniu, Your Orator being an infant as aforesaid, the said Kinimaka assumed the guardianship of the said property, and continued to exercise the power of guardian therein until the time of the division of lands in the year 1848 when he surrendered the first eight lands above named to His Majesty Kamehameha III retaining the remaining four—which four he did or should have received in trust for Your Orator; and furthermore, during the Session of the Board of Land Commissioners to quiet Land Titles, the said Kinimaka did enter before the said Board the claims to the houselots and small divisions of land aforesaid belonging to the Estate of Kaniu and procure the same to be awarded to himself, which lots and divisions as shown by the testimony taken before the said Board, could only be held by the

said Kinimaka in trust for the heir of Kaniu, which heir Your Orator claims to be as hereinbefore shown. And your Orator further showeth to Your Honor, that prior to the decease of Kamehameha III and Abner Paki a high chief and during the minority of Your Orator, the said Kinimaka never disputed or denied the rights of Your Orator in the premises, but on the contrary frequently to Your Orator, and as Your Orator is informed, to others, did expressly declare treat and speak of Your Orator as the adopted child of Kaniu, and the heir to the property aforesaid. Wherefore Your Orator did not then become aware of any intention on the part of the said Kinimaka to defraud and injure Your Orator in the premises. But subsequent to the death of Kamehameha III and of the A. Paki aforesaid, and since Your Orator arrived at legal age the said Kinimaka has pretended that he himself is the heir of Kaniu and sole owner of the said property, has refused to convey the same to Your Orator, and has denied and does still deny Your Orator's rights therein and thereto.

Therefore Your Orator charges that the said Kanimaka well knowing the premises to wit, that Your Orator is heir of Kaniu and of right entitled to the possession and enjoyment of the said property and that he has held the same only in trust for Your Orator has withheld and does withhold the same collusively, fraudulently and with intent to deprive Your Orator of his just rights therein.

Wherefore Your Orator prays the aid of Your Honorable Court that a day and hour may be appointed for the hearing of this his complaint and of the proofs of the matters herein set forth, and that the said Kinimaka may be cited then and there to appear before Your Honorable Court to answer to the matters and things therein contained as fully as if as to each and all of them particularly interrogated, and to show cause if any there be, why the prayer of Your Orator, should not be granted. And that Your Honorable Court will grant such other and further relief in the premises as your Honorable Court may be competent to give and as justice may demand.

And Your Orator will ever pray etc.

DAVID KALAKAUA.

Subscribed and sworn to before me this 29th day of December 1856.

G. M. ROBERTSON,

Acting Chief Justice of the Supreme Court.

Let process issue as prayed for, returnable before the Chief Justice at Chambers, on the 14th day of January 1857.

G. M. ROBERTSON,

Acting Chief Justice.

Endorsed: Filed 30th Dec. '56. Jno. E. Barnard, Clerk Sup. Court.

To William C. Parke, Marshall of the Hawaiian Islands, Greeting:

You are commanded by order of the Honorable William L. Lee, Chief Justice of the Supreme Court, to summon—Kinimaka of — Defendant, to be and appear before the Honorable William L. Lee aforesaid, at his Chambers in the Court House in the city of Honolulu, Island of Oahu, on Wednesday the fourteenth day of January—next, at ten o'clock A. M. to show cause why the prayer of David Kalakaua Complainant—should not be granted, pursuant to the tenor of his bill of Complaint hereto annexed.

And have you then there this Writ, with full return of your proceedings thereon.

Witness, The Honorable William L. Lee, Chief Justice of the Supreme Court, at Honolulu—this 30th day of December A. D. 1856

[SEAL.]

JNO. E. BARNARD,

Clerk Supreme Court.

237 Served the within Summons on the within named persons by leaving a certified copy of the same in *his* possession, this 31st day of December A. D. 1856.

N. C. PARKE, *Marshall.*

Endorsed: Supreme Court, (In Equity.) David Kalakaua vs Kinimaka. Petition & Summons. 30th Dec'r 1856.

In re DAVID KALAKAUA

vs.

KINIMAKA.

To the Honorable G. M. Robertson, Acting Chief Justice and Chancellor of the Hawaiian Islands:

The Orator in the above entitled cause by the Undersigned His Attorney, respectfully suggests to Your Honor, that on or about the 24th day of January last, the above named, Respondent deceased after service of Your Orator's Petition and before answer filed leaving as heirs by will his three minor children Kaniu, D. Leleo & Moses Kapaakea, which said will has been duly admitted to Probate—and Your Orator further suggests that the said heirs are the legal representatives and successors of the Respondent, aforesaid, in

238 the Trust in certain Real Estate charged in the Bill filed in this cause to exist in favor of Your Orator.

Wherefore the said Orator prays that the said heirs may be made parties to the said Bill, and that a guardian ad litem may be appointed for them by Your Honorable Court. And that Your Honor will be pleased to appoint a day and hour for the further hearing of this cause.

And your Orator will ever pray &c.

JAS. W. MARSH,
Att'y for Kalakaua, Orator.

Honolulu, March 16th, 1857.

Endorsed: Supreme Court (In Equity)—David Kalakaua vs Kinimaka. Petition for the appointment of a Guardian ad litem Filed 19th March 1857. Jno. E. Barnard, Clerk Supreme Court.

Endorsed: E. 155. Supreme Court. David Kalakaua vs. Kinimaka. Records. 1857.

239

APPENDIX C.

Estate of Kaniu, Prob. 1770.

Supreme Court. At Chambers.

24th April, 1858.

In the Matter of the Estate of L. H. KANIU, Dec'd.

Before G. M. Robertson, Associate Justice.

Mr. Harris for the Applicant made his argument to the Court.
Mr. Davis, for the widow and heirs of Kinimaka.
The Court took time to consider of the case.

Endorsed: Supreme Court—In the Matter of the Estate of L. H. Kaniu, deceased. Proceedings. 24th April 1858.

240

Estate of Kaniu, Prob. 1770.

Supreme Court.

In the Matter of the Estate of L. H. KANIU, Deceased.

Decision of the Hon. G. M. Robertson.

My Judgment is that the verbal will of L. H. Kaniu made in the year 1843, by which she bequeathed all her property to David Kalakaua, is duly proven, and that letters testamentary thereon, with copy of this Judgment annexed, be issued to him, the said David Kalakaua.

(Sg.)

G. M. ROBERTSON,
Associate Justice of the Supreme Court.

Honolulu 3 May 1858.

241 To all persons to whom these presents shall come:

Be it known, that I, G. M. Robertson, Associate Justice of the Supreme Court of Law and Equity for the Hawaiian Islands, by virtue of the powers vested in me, do hereby grant these letters testamentary, with copy of Judgment annexed, to David Kalakaua, upon the Will of L. H. Kaniu late of Honolulu, in the Island of Oahu, deceased. And I do hereby give him the aforesaid David

Kalakaua all the necessary powers of administering upon all the rights, credits and effects, real and personal, of the said L. H. Kaniu of Honolulu, Oahu, deceased, and of collecting and settling all debts due to or owing by said Estate, and all persons are hereby commanded to respect this his authority.

Given under my hand and the seal of this Court at Honolulu this 3rd day of May A. D. 1858.

(Signed)

G. M. ROBERTSON,

Associate Justice of the Supreme Court.

P. 1770.

Endorsed: Supreme Court. In the Matter of the Estate of L. H. Kaniu deceased. Letters Testamentary with copy of Judgment annexed. 3 May, 1858.

242

Est. of Kaniu, Prob. 1770.

Supreme Court.

In Probate. At Chambers.

In the Matter of the Estate of L. H. KANIU, Deceased.

Before Associate Justice Robertson.

The petitioner, David Kalakaua, sets forth in his petition, that L. H. Kaniu, a female Chief of this Kingdom, deceased at Honolulu in the year 1843; that he was the adopted son of the deceased and grandson of her brother; and that at the time of her death she was possessed of a considerable amount of real property, which she bequeathed verbally in accordance with ancient usage, to the petitioner, directing her husband, the late Kinimaka, to take care of the said property for the benefit of the petitioner, who was then an infant, and he now prays to be permitted to prove such verbal will of Kaniu, and that letters of administration on her estate may be granted to him.

Citation was issued to Pai the widow of Kinimaka, and to the guardian ad litem of his minor heirs, to appear and contest this application.

It was admitted at the hearing, by Counsel for the heirs of Kinimaka, that up to the year 1844, the chiefs, by the custom of the country, were in the habit of passing their estates by verbal will with the knowledge and approval of the King and Premier, and that such wills were recognized by the authorities as binding and operative, and that coverture did not affect the right to make a will.

Nauhele, formerly a member of Kaniu's family, testified in substance, that Kaniu died in Honolulu, in the year 1843, leaving a husband, Kinimaka, who died last year; that Kaniu had no child of her own; that at the time of her death she was possessed of real estate on Hawaii, on Molokai, in Honolulu and in Lahaina, that the petitioner's grandfather Aikanaka, an

Kalailua, the mother of Kaniu, were brother and sister; that Kaniu, a few days previous to her death, bequeathed all her property verbally, to the petitioner, in presence of Governor Kekuanaoa, Kahina the witness and others; and that at the great division of lands in 1848, Kinimaka went before the King and divided the lands left by Kaniu, as in his own right.

M. Kekuanaoa testified, in effect, that a short time previous to her death, Kaniu sent for him to hear what she had to say respecting the disposition of her property; that he was at that time Governor of this Island, and Judge of the Court of Oahu, and that it was usual in those times for persons who were dying to send for him that he might hear, as Agent for the King, what they had to say in relation to the disposal of their property; that he asked Kaniu, in presence of her husband "who do you wish to be your heir?" when she replied that David Kalakaua was to be heir to all her property; that he suggested to her the propriety of leaving the property in the hands of Kinimaka until David should become of age, to which she assented, and that he understood Kinimaka to agree at that time to this disposition of the property; that immediately after Kaniu's death, Kinimaka went to Lahaina to inform the King and Premier, while the witness, at the same time, wrote to the Premier notifying her that Kaniu had disposed of her property in the manner before stated; that he received a letter from the Premier, in reply, stating that the King had given all the property to Kinimaka, which the witness afterwards told the Premier was not in accordance with the will of Kaniu to which she replied, "well, the King has done
244 it"; that Kaniu was of higher rank than her husband who was but a petty chief; that she had told the witness some time before she made her will that she had adopted David Kalakaua, and that he thinks this was antecedent to the enactment of any statute regarding the adoption of children.

Charles Kanaina, testified in substance that at the time Kaniu died he was at Lahaina with his wife M. Kekauluohi, who was at that time the Premier of the Kingdom; remembered that Kinimaka came to Lahaina, and in the presence of witness and several other chiefs, informed the Premier that Kaniu was dead, and that she had bequeathed her property to the petitioner, to which the Premier replied, "that is good, if you and your wife agreed to do so, it is right the property should go to the moopuna"; that the Premier at the same time received a letter from the Governor of Oahu, informing her to the same effect; and that a short time afterwards, Kinimaka told the witness, in Honolulu, that he was to have charge of the property during his lifetime, and after that David was to have it.

Per Curiam:

Upon the facts of this case, as they appear from the evidence adduced I am of the opinion that the application of David Kalakaua must be sustained. I think there can be no reasonable doubt that Kaniu, a short time before her death, made and declared a verbal will, by which she bequeathed all her separate property, both real and personal, to the petitioner, giving directions, at the

same time, that her husband, Kinimaka, should hold and take charge of the property for the heir, until he should become of age.

As to the validity, in law, of such a verbal will, made and published according to the custom of the country, at any time antecedent to the enactment of the Organic Laws, in the year 1846,

245 have no doubt, chiefs and others possessed of property, were in the habit, in those days, of passing their estates in that manner and their verbal will- were recognized as binding and operative to all intents and purposes.

It may be objected in the present case, that the petitioner has failed to show that the King and Premier approved the will of Kaniu, in his favor, and that, therefore, it ought not to be held valid. But this objection, it seems to me, cannot be regarded as a sound one, because the King, I think, had not the power, under the circumstances, even if he had so intended, which does not seem clear, to annul the will of Kaniu, and substitute Kinimaka as her heir in the place of David Kalakaua, whom she had expressly nominated. Nothing but some strong legal objection could have justified the annulment of the will. It was made subsequently to the adoption of the old Constitution, which guaranteed protection, alike for chiefs and common people, in their lives, liberty and property. The law which regulated the descent of lands to heirs, at the time of Kaniu's death, was approved at Lahaina, on the ninth day of November 1840. According to the provisions of that law, it does not appear to me that the express approval of the King and Premier was necessary to validate the will of Kaniu. The language of the English version of the Statute is as follows: "Be it furthermore enacted in relation to lands which Kamehameha 1st. and Kamehameha 2nd. gave to land agents, that after the publication of this law respecting taxation, whenever any of those land Agents dies, his heirs shall render an account to His Majesty the King of the lands which belonged to the deceased, and these shall return one-third of the lands to the King. According to this rule, all the lands, whether few or many of every man who dies shall be divided. But if twelve months elapse after the death of any person, and the heir neither present himself before the King nor sent a written notice, then the lands of the heir shall be divided equally. Hereafter,"

246 lands of all heirs shall be divided thus, when the King is not notified." "From this time forth, the King and Premier must be informed of all bequests of lands, and whatever Estates to the heirs" (See Old Laws pp. 47 and 48, Article 14).

Nothing is said in this statute of the approval of will, by the King and Premier, but, simply, that they should be duly notified without delay. This provision was fully complied with in the present instance, by the official notification of the Premier by the Governor of Oahu, and the verbal report of Kinimaka.

Again, it may be objected further, that it would not be safe, at the lapse of so great a length of time, to allow a nuncupative will, the terms of which are not shown to have been reduced to writing within a reasonable time after the death of the testator, to be proved solely by the oral testimony of witnesses whose recollection of

ticular facts, at so great a distance, may have become indistinct and unreliable, and that the petitioner or his relatives, ought to have taken steps to assert his alleged rights at an earlier day. To these objections it is answered that Governor Kekuanaoa has given some testimony to show that the terms of Kaniu's will were reduced to writing, about the time she declared it verbally in his presence, and that the writing was then in the possession of Kinimaka; and that the petitioner, who only became of age about *to* sixteen months ago, did as soon as was convenient thereafter, commence proceedings for the recovery of the property bequeathed to him by Kaniu, which proceedings abated by the death of Kinimaka.

It appears to me that the position of the several witnesses who have testified, at the time when Kaniu's death took place, and the means of knowledge which they consequently possessed, were such as to add greatly to the credibility of their testimony, and, in the absence of any statute limiting the time within which a will
247 may be proved, I think the Court would not be justified, notwithstanding the lapse of so long a period of time in rejecting, even a verbal will, made in accordance with the laws of the lands as it then stood, the proof of which is so clear.

My Judgment is that the verbal will of L. H. Kaniu, made in the year 1843, by which she bequeathed all her property to David Kalakaua, is hereby proven, and that letters testamentary thereon, with copy of this judgment annexed, be issued to him, the said David Kalakaua.

Honolulu 3 May, 1858.

Endorsed: Supreme Court. In the Matter of the Estate of L. H. Kaniu deceased. Decision of Judge Robertson. 3 May 1858.

248

Est. Kaniu, Prob. 1770.

Supreme Court. At Chambers.

26th Feb'y, 1858.

In the Matter of the Estate of LILIA H. KANIU, of Honolulu, Deceased.

Before Hon. G. M. Robertson, Associate Justice.

David Kalakaua appeared in Support of his application for Letters of Administration.

M. KEKUANAOA, SWORN, says:

I know Kaniu in her lifetime, she resided in Honolulu she died in Honolulu in the year 1843. She left a husband whose name was Kinimaka. He died during last year. Kaniu left no child. She died intestate. I can't say whether she left property or not of her own. The applicant, David Kalakaua is a distant relative to Kaniu, through his mother Keohokalole. I don't know of any near relative

of the deceased now alive. A short time previous to her death I went to visit her in company with her husband she appeared to be quite weak and failing, & I asked her in case of her death who would be her heir, she replied that David Kalakaua would be her heir. Her husband who was present gave his consent thereto. She said she intended all her lands and separate property to go to David Kalakaua. I said to her you had better leave this property in charge of your husband to take care of for him and she said "yes that's very good."

249 NAUHELE, sworn, says:

I was acquainted with Kaniu. She died in Honolulu, I think in the year 1843 leaving a husband whose name was Kinimaka. He died some time last year. Kaniu left no child of her own. She left several lands at Honouli on Molokai, Kapalaua on Hawaii, she also left a kale patch near Honolulu, in the Ili of Kaaleo, Two house lots on the East side of Honolulu. That is all the property that I know of. She left also a house lot at Lahaina. The applicant's Grandfather and Kaniu's mother were brother and sister. David Grandfather's name was Aikanaka and the mother of deceased was Kalailua. Kaniu made no written will. A few days previous to her death she willed all her property verbally to David. Kahina who is now present was present at the time she made that verbal declaration. Kekuanaoa & myself were present also and several others who are now dead. Keohokalole who is now alive is the daughter of Kaniu's brother, Aikanaka.

Postponed for one week.

JNO. E. BARNARD,
Clerk Supreme Court.

P. 1770.

Endorsed: Supreme Court. In the matter of the Estate of Lilia H. Kaniu deceased. Proceedings. 26 Feb'y, 1858.

250

Probate 1770.

Supreme Court. At Chambers.

April 1, 1858.

In the Matter of the Estate of L. H. KANIU, Deceased.

Before the Hon. G. M. Robertson, Associate Justice.

Parties appeared pursuant to adjournment.

M. KEKUANAOA, Sworn, Says:

I knew Kaniu. I was present at the time she died. Previous to her death she sent for me to come to see her. I asked what she wished, she replied that she thought she was dying and wished the Governor to hear what she had to say. I was at the time Judge

of the Court at Oahu and also Governor of the Island. I asked her "who do you wish to be your heir?" She replied "that David Kalakaua was to be heir to all her property. she had taken David Kalakaua, who was then an infant and adopted him according to the custom at that time;" Kaniu was of higher rank than her husband who was a petty chief. Kinimaka was present at that time. I said to her that she had better leave the property in the hands of Kinimaka until David became of age. She assented to that. I understood Kinimaka to agree to the proposal at the time—it was usual for parties who were dying to send for me in those times that I might hear what they had to say relating to their property as agent for the King. Kaniu did not notify me that she had adopted David Kalakaua—she had stated so to me before that time. I think the law relating to the adoption of children had not been enacted at the time she informed me of having adopted David.

I remember that Kinimaka went to Lahaina to inform the premier and I at the same time wrote to the Premier informing her that Kaniu was dead and that she had willed her property to David Kalakaua. Kinimaka to take charge of it till David came of age. I received a letter from the Premier afterwards informing me that the King had given all the property to Kinimaka himself. When I met the Premier I told her that it was not in accordance with the will of Kaniu and she replied "Well the King had done it—Kaniu stated that the paper which I saw expressed her will in the same way that she had expressed it verbally. I did not see her sign the paper but she told me that she had signed it—she may have lived a week after this. I did not visit her house again between the time of this conversation and her death.

KANAINA, sworn, says:

I knew Kaniu and her husband Kinimaka. I was at Lahaina when Kaniu died. Kekauluohi the late Premier was my wife. I remember that Kinimaka came up to Lahaina to inform the Premier of the death of Kaniu. Kinimaka informed the Premier in my presence and in the presence of several other chief- that Kaniu had left her property to David Kalakaua. Kekauluohi said "that is good if you and your wife agreed to do so it is right the property should go to the Moopuna." I never heard any conversation between Kinimaka and the King respecting this subject, but suppose the King heard of it. I never heard whether the King approved of it or not—the Premier received a letter from the Governor of Oahu informing her of Kaniu's death and that she had left her property to David Kalakaua. Kinimaka told me that Kaniu said the property was to be in his charge for his life time and afterwards to go to David Kalakaua; this conversation took place shortly after Kaniu's death. I cannot state what year Kaniu died.

The Court postponed the further hearing of this case until 24 inst.

WILL'M HUMPHREYS,

Ass't Clerk.

Endorsed: P. 1770. Supreme Court. In the Matter of the Estate of L. H. Kaniu deceased. Proceedings. 1 April 1858.

Probate 1770.

Supreme Court. At Chambers.

17 March, 1858.

In the Matter of the Estate of L. H. KANIU, Deceased.

Before the Hon. G. M. Robertson, Associate Justice.

Petition of D. Kalakaua for Letters of Administration & Appointment of Guardian ad Litem to Minor Children.

Mr. Harris appeared for D. Kalakaua. Mr. Bates appeared for the Guardian appointed by the Court on the 9th of March.

Mr. Bates admitted that Kalakaua was not 20 years of age when he commenced these proceedings, had no objection to their taking out Letters of Administration.

Mr. Harris moved the evidence of the 26 Feb'y on appl'n made by Kalakaua to Judge Andrews on this same issue may be read and received on the present hearing.

Motion granted.

Mr. Harris moved that verbal wills being admitted under the old custom this should be read. It was admitted that up to the year 1844 the chiefs by the custom of the country were in the habit of passing their Estates by verbal wills with the knowledge & consent of the King, and that such wills were recognized by the authorities binding & operating and that coverture did not affect the right to make a will.

NAUHELE, Sworn Says:—

I was acquainted with Kaniu when she was alive. I was present when she died. I heard her make a declaration regarding *his* property. After the death of Kaniu I continued to live with Kinimaka, the husband of Kaniu. In 1848 at the time of the great division of land Kinimaka went before the King & claimed the land of Kaniu for himself because the words of the deceased had been left without being fulfilled and in a state of uncertainty on account of the youth of David. I went with Kinimaka myself. The King said part of the land should be set apart for the government and part for Kinimaka—that was in accordance with Kinimaka's request. When Gov. Kekuanaoa arrived at the house, Kaniu said to him in presence of her husband I have sent for you and now declare to you who is to be my heir, our grand child to be the heir of all my property from Hawaii to Kauai and everything that belongs to me, the Gov. said to her that David was very young and unable to take care of the property therefore you had better let Kinimaka have the property till David grows up. Kaniu declined this proposition to consider the property any one's but David's—but wished it to be his at once and requested the governor to take care of it but he said Kinimaka should take care of it till he died. I

don't know if the King knew anything about this will at that time, he might have known it afterwards.

KAHINA, sworn, says:

I lived with Kinimaka—from the time I was a small boy. I have heard Kinimaka spoke of it but was never present at any conversation between the King and Kinimaka with regard to it.

The Court adjourned this case until Wednesday the 24th instant for the production of further evidence.

WILLIAM HUMPHREYS,
Clerk Supreme Court pro Tem.

255

Probate 1770.

Supreme Court. At Chambers.

24th March, 1858.

In the Matter of the Estate of L. H. KANIU, Deceased.

Before the Honorable Elisha H. Allen, Chief Justice.

Parties appeared pursuant to adjournment from the 17th current.

As Justice Robertson was out of town, he having heard the former evidence in this case, the Court adjourned the further hearing until the 31st inst.

WILLIAM HUMPHREYS,
Clerk Sup. Court pro Tem.

256

Probate 1770.

To W. C. Parke, Marshal of the Hawaiian Islands, Greeting:

You are hereby commanded to cite George E. Beckwith, Esqr., Administrator upon the Estate of Kinimaka and Guardian ad litem of the Minor children of the said Kinimaka, and Pae his widow to be and appear at the Court House in the Town of Honolulu to show cause, if any they have, why Letters of Administration may not issue to David Kalakaua, upon the Estate of Kaniu deceased, in accordance with the prayer of his petition to that effect; on the 17th day of March inst. at Nine o'clock, A. M. which suit is then and there to be tried. Hereof fails not at your peril, and make due return of your process, with your proceedings thereon.

Witness, The Honorable Elisha H. Allen, Chief Justice of the Supreme Court, at Honolulu, the 9 day of March A. D. 1858.

[SEAL.]

WILLIAM HUMPHREYS,
Clerk Sup. Court pro Tem.

Served the Citation on the within mentioned person by leaving a certified copy of the same at his usual place of abode this 9th day of March A. D. 1858.

W. C. PARKE,
Marshal of the Hawaiian Islands.

Endorsed: P. 1770. Supreme Court. In the matter of the Petition of D. Kalakaua for Letters of Administration on the Estate of Kaniu & appointment of Guardian to Minor children of Kinimaka. Citation.

Fees: Service	\$5.
	1.50
	<hr/>
	\$6.50

Copy.

9 March 1858.

257

Prob. 1770.

In Probate.

OAHU, ss:

To the Honbl. G. M. Robertson, Associate Justice of the Supreme Court:

The undersigned David Kalakaua respectfully makes known unto Your Honor that one Kaniu, a native chiefess of this country, deceased about the year 1843 at Honolulu and in accordance with the then usage of this country verbally bequeathed all her property to your petitioner who was her adopted son, and grandson to the brother of the deceased, directing her husband, one Kinimaka to take care of her said property—for the benefit of the petitioner. And your petitioner further represents that at the time of the decease of the said Kaniu she was possessed of and entitled to a large amount of real property in this Kingdom.

Wherefore your petitioner prays that he may be permitted to prove the will and testament of the deceased as aforesaid, and his relationship to the deceased. And that Letters of Administration upon the estate of the said Kaniu may be granted to him the undersigned. And your petitioner further prays that George E. Beckwith Esqr. Administrator of the Estate of Kinimaka, which Kinimaka was the husband of Kaniu and is now deceased, and Pae, widow of the said Kinimaka, may be cited to show cause, if any they have, why letters of administration may not issue to the undersigned as prayed.

And your petitioner further prays that a guardian ad litem may be appointed for the minor children of the said Kinimaka and that the said children may be cited by their said guardian, to show
258 cause why Letters should not issue as aforesaid.

Your petitioner is advised and believes that the said Minor children are three in number, Kaniu, D. Leleo & Moses Kapaakea. And your petitioner as in duty bound will ever pray, etc.
Honolulu, Oahu, Mch. 6th, 1858.

CHAS. C. HARRIS,

Attorney for David Kapaakea Kalakaua.

Subscribed and sworn to before me this 8th day of March, 1858.

WILLIAM HUMPHREYS,

Clerk Supreme Court pro Tem.

Endorsed: P. 1770. Supreme Court. In the matter of the Estate of L. H. Kaniu and appointment of guardian to the minor children of Kinimaka. Petition of David Kalakaua. Filed 8 March, 1858.

259

Probate 1770.

Supreme Court. At Chambers.

March 9, 1858.

Before the Hon. G. M. Robertson.

In the Matter of the Estate of L. H. KANIU, Deceased, and the Appointment of a Guardian for the Minor Children of Kinimaka.

Upon reading and filing the Petition of David Kalakaua for Letters of Administration upon the Estate of Kaniu deceased, and the appointment of a Guardian ad litem for the Minor children of Kinimaka.

The Court did order that George E. Beckwith, the Administrator upon the Estate of Kinimaka, deceased, be appointed Guardian ad litem of the three minor children of Kinimaka, Kaniu, D. Leleo and Moses Kapaakea.

WILLIAM HUMPHREYS,
Clerk Sup. Court pro Tem.

Endorsed: P. 1770. Supreme Court—In the matter of the Estate of Kaniu and appointment of a Guardian for the Minor children of Kinimaka. Proceedings. 9 March, 1858.

260

APPENDIX D.

In Equity.

To the Honorable E. H. Allen, Chief Justice of the Supreme Court of Law and Equity of the Hawaiian Islands:

The undersigned, your Orator, respectfully represents and gives this Honorable Court to understand that one Kaniu, a native chiefess of this country, deceased at Honolulu, Island of Oahu during or about the year 1843, having declared by her last will and testament your Orator, to be her heir, and directed that her property should become the property of the Orator, that your orator was at that time, to wit: at the time of the decease of the said Kaniu, an infant. Your Orator having been born, as he is informed and believes, on the 16th day of November A. D. 1836.

That the aforesaid Kaniu, at the time of her said decease, directed her Husband, one Kinimaka to manage the property—thus bequeathed, to your orator, for his—your Orator's benefit, during your Orator's infancy. That however—your Orator, on coming of age,

discovered that the said Kinimaka, whilst acting as guardian, as aforesaid, had procured the award of the Land belonging to the said Kaniu, during his lifetime to be wrongfully and fraudulently issued in his own the said Kinimika's name; that the said Kinimaka deceased in the month of January 1857, without having conveyed the titles of the property to your Orator.

And your Orator further makes known to your Honbl. Court that on the 3rd day of May, this present year, your Orator duly proved the will of the said Kaniu at the Court of Probate duly held, on the said day, before the Honbl. Associate Justice G. M. Robertson, the certificate of which said Probate, is hereto annexed.

And your Orator further makes known to your Honbl. Court that the land- bequeathed to him by the said Kaniu are two House lots in the City of Honolulu. Awarded by Land Commission Award No. 129 confirmed by Royal Patent 1602—And an Ahupuaa of land situated in the Island of Molokai, called Onou limaloo and awarded by Land Commission Award No. 7130, with a Kalo patch at Kaaleo—Island of Oahu, as per award No. 7130.

And Your Orator further makes known to your Honorable Court that the title of the said land was at the time of the decease of the said Kinimaka, in the said Kinimaka, in trust for, and for the use and benefit of Your Orator.

That Your Orator is the grand Nephew of the deceased Kaniu, and was her adopted child—as your Orator is informed and believes, and therefore swears—Your Orator is advised by counsel that at the time of the decease of the said Kaniu his said ancestress, she was competent by the law and custom of this Kingdom, to make a will, and that her said will would, pass the said property to and vest the same in Your Orator, or in the aforesaid Kinimaka for his, Your Orator's use and benefit.

And Your Orator would further represent that the procuring of the said Award to be made in his own name, by the said Kinimaka was contrary to Equity and good conscience. And your Orator would further represent that the said Kinimaka, at the time of his decease, left a widow by name Pai—and minor children by name Kaniu, David Leleo and Kinimaka, who succeed to the right of the said Kinimaka, for which said children—R. B. Armstrong, D. D. has been appointed Guardian.

And Your Orator, respectfully representing that he can have no remedy in the premises except in a court of Equity.

humbly prays that the said Pai and the Guardian of the said children, may be summoned to show cause, at such time and place as may be most convenient for Your Honbl. Court—why it should not be decreed that the lands, hereinbefore mentioned of right belong to your Orator.

And Your Orator further prays that it may be decreed, that the said Kinimaka did, during his lifetime, procure the awards and hold possession of the before mentioned lands, for the use and benefit of Your Orator, And further that the said R. B. Armstrong Guardian of the said Minor children of the said Kinimaka—may be ordered to convey to Your Orator all the right, title and interest of the said chil-

dren in the aforesaid lands: and further that the aforesaid Pai, widow as aforesaid of the said Kinimaka, deceased, may be ordered to convey to your Orator, all her right, title and interest in and to the above enumerated lands. And that all such other orders and decrees may be made and passed in the premises, as may pertain to Equity and good conscience, and may give relief to Your Orator in the premises.

And Your Orator as in duty bound will ever pray, etc.

Honolulu, Oahu, July 19th, A. D. 1858.

DAVID KALAKAUA.

Charles C. Harris for and in behalf of David Kalakaua to me well known, being duly sworn, deposeth and saith that the facts herein above set forth are true.

CHAS. C. HARRIS.

Subscribed and sworn to before me this 19th day of July A. D. 1858.

JNO. E. BARNARD,
Clerk Supreme Court.

Let proven issue as prayed for returnable before me at my Chambers on the 23rd day of July 1858.

ELISHA H. ALLEN,
Chief Justice of the Supreme Court.

263

Letters Testamentary.

To all persons to whom these presents shall come:

Be it known that I, G. M. Robertson, Associate Justice of the Supreme Court of Law and Equity for the Hawaiian Islands by virtue of the powers vested in me do hereby grant these letters testamentary, with copy of Judgment annexed, to David Kalakaua, upon the will of L. H. Kaniu, late of Honolulu, in the Island of Oahu, deceased; And I do hereby give him, the aforesaid David Kalakaua, all the necessary powers of administering upon all the rights, credits and effects, real and personal, of the said L. H. Kaniu, of Honolulu, Oahu, deceased, and of collecting and settling all debts due to, or owing by said Estate, and all persons are hereby commanded to respect this his authority.

Given under my hand and the seal of this Court, at Honolulu, this 3rd day of May A. D. 1858.

[L. SEAL.]

(Signed) G. M. ROBERTSON,
Associate Justice of the Supreme Court.

264

Supreme Court.

In the Matter of the Estate of L. H. KANIU, Deceased.

Judgment.

My judgment is that the verbal will of L. H. Kaniu, made in the year 1843, by which she bequeathed all her property to David Kala-

kaau, is duly proven, and that letters testamentary thereon, with copy of this judgment annexed, be issued to him, the said David Kalakaua

(Signed)

G. M. ROBERTSON,

Associate Justice of the Supreme Court.

Honolulu, 3rd March, 1858.

HONOLULU, *Oahu*:

I hereby certify that the foregoing are true and faithful copies of the original documents now on file in the office of the Supreme Court

As witness my hand and the Seal of the Supreme Court at Honolulu, Oahu, this 20th day of July A. D. 1858.

JNO. E. BARNARD,

Clerk Supreme Court.

Endorsed: Supreme Court—David Kalakaua vs. Pai, Richard Armstrong, Guardian of Kaniu, David Leleo and Kinimaka—Petition.

265 To W. C. Parke, Esq're, Marshall of the Hawaiian Islands,
Greeting:

Elisha H. Allen

You are commanded by order of the Honorable [William L. Lee],*
Chief Justice of the Supreme Court, to summon Pai (w), and Rich-
Kinimaka

ard Armstrong (Guardian of Kaniu, David Leleo and [Kamaka]*
Defendants, [in case shall file written answer within twenty days
after service thereof]* to be and appear before the Honorable

Elisha H. Allen aforesaid
[William L. Lee aforesaid]* at his Chambers in the Court House in
the city of Honolulu, Island of Oahu, on Friday the Twenty third
day of July instant [next],* at ten o'clock A. M. to show cause why
the prayer of David Kalakaua of Honolulu, Complainant, should
not be granted pursuant to the tenor of his bill of complaint hereto
annexed.

And have you then and there this Writ, with full return of your
proceeding thereon.

Elisha H. Allen

Witness, The Honorable [William L. Lee]* Chief Justice of the
Supreme Court, at Honolulu this 20th day of July A. D. 1858.

[SEAL.]

JNO. E. BARNARD,

Clerk Supreme Court.

Served the within Summons and annexed petition on the within
mentioned R. Armstrong by leaving a certified copy of the same
with A. B. Bates the Attorney of R. Armstrong this 21st day of
July A. D. 1858.

Served the within Summons and annexed petition on the within
mentioned Pai w by leaving a certified copy of the same at her usual

place of abode with a member of her family, the within mentioned Pai being absent at Hawaii this 21st day of July A. D. 1858.

W. C. PARKE,
Marshall of the Hawaiian Islands.

266 Endorsed: Supreme Court (In Equity). David Kalakaua
vs. Richard Armstrong, Guardian &c. Petition and Citation.

Fees.

2 copies petition.....	6.00
2 " Summons	3.00
2 Services	10.00
	<hr/>
	\$19.00

20 July, 1858.

267 Before the Chief Justice of the Supreme Court. In Equity.

PAI & RICHARD ARMSTRONG, Guardians of Kaniu, David Leleo, &
Kinimaka, Minors,
vs.
DAVID KALAKAUA.

The Joint & Several Answers of Pai & Richard Armstrong, Guardians of Kaniu, David Leleo, & Kinimaka, Minors, Defendants, to the Bill of Complaint of David Kalakaua.

These Defendants now & at all times hereafter saving & reserving unto themselves all benefit & advantage of exception, to the said Bill of Complaint for answer thereto saith, they know not & have not been informed except by the complainant's Bill & can not admit or deny but that Kaniu, a native Chiefess did decease in or about the year 1843 having declared by her last Will & Testament that the complainant was to be her heir & that her property was to become his property, nor that the said complainant was a minor, nor that the said Kaniu at the time of her decease directed her husband to manage the property that had belonged to her as the property of the complainant during his infancy & leave the complainant to make proof thereof.

These Defendants further answering say they are ignorant & can not state whether Kinimaka wrongfully & fraudulently procured awards to be issued in his own name, of the land formerly belonging to Kaniu, but they state it as their belief, that if the awards have wrongfully been issued to the said Kinimaka, the same were issued upon testimony produced to the Board of Commissioners to
268 quiet land titles, which satisfied that Board that the said Kinimaka was entitled to such award.

These defendants admit Kinimaka's deceased in the month of January 1857 without having conveyed the title of the property to

the complainant & aver that he was never requested so to do during her life time as they verily believe.

These Defendants further admit that on the 3rd day of May in this year the complainant did prove the will of Kaniu as alleged in Complainant's Bill of Complaint, but they aver they have no knowledge & can neither admit or deny that this property bequeathed to the complainant by Kaniu by said Will are the Lots or premises awarded by the said Board of Commissioners to quiet land titles to Kinimaka in Award numbered 1602 7130 but leave the Complainant to prove his allegations in relation thereto.

And these Defendants further answering say they are ignorant & can not admit or deny the allegations of the Complainant that the title vested in the said Kinimaka by aforesaid awards were in trust for the use & benefit of the complainant but leave the complainant to make proof of all the allegations in that behalf.

And these Defendants further answering say that they are not skilled in the Law & have no opinion in relation to the will of Kaniu & leave it for the Court to adjudge upon the facts that may come to its knowledge whether by the said Will the said property hereinafter set forth was vested in the complainant or the aforesaid Kinimaka for his use & benefit, but they aver as far as they have any knowledge that the statement that the said Kinimaka procured an Award to be made in his name contrary to equity & good conscience.

And these Defendants further admit that at the time of Kinimaka's decease he left Widow by the name of Pai & minor
269 children by the names of Kaniu, David Leleo & Kinimaka who claim that they are the lawful heirs of the said Kinimaka & that all of his estate is vested in them & they further admit Richard Armstrong has been duly appointed Guardian of the said minor heirs.

And these Defendants humbly submits & insists that the prayer of the Complainant's Bill of Complaint upon the facts as they now appear before the Court should not be granted & that unless the allegations are established by proofs, they should be hence dismissed with costs, most wrongfully sustained.

PAI.

RICHARD ARMSTRONG,

Guardian of Kaniu, David Leleo, Kinimaka, Minors,
By ASHER B. BATES,

Their Solicitor.

Endorsed: Supreme Court. In Equity. David Kalakaua vs. Rich'd Armstrong &c. Answer. Filed 17 Aug't, 1858. Jno. E. Barnard, Clerk Sup. Court.

270

Supreme Court. At Chambers.

18 August, 1858.

DAVID KALAKAUA

vs.

PAI, RICHARD ARMSTRONG, Guardian of Kaniu, David Leleo, and Kinimaka.

Before Hon. E. H. Allen, Chief Justice.

Mr. Bates filed his answer by which he raised the question, admitting that Kaniu made a will leaving her property to David, that the property in controversy was justly awarded to Kinimaka in his own right, & denied that it was in trust for David.

Mr. Harris said that Kaniu married Kinimaka, & that before her death she made a verbal will leaving her property to David & it had been decided by Justice Robertson that the verbal will was good. That Kinimaka died in 1843. That at the division of the lands the Ili Onoulimaloo did actually belong to Kaniu and that he Kinimaka had no right except thro' Kaniu. That two house lots in Honolulu, & one Kalo patch at Kaleo—which he claimed was awarded to Kinimaka by the Land Commission Award 129 & 240 upon proof that they did belong to Kaniu. That if they belonged to Kaniu Kinimaka had no right to them, that he was not entitled to an award in his own right, but as the Guardian of David Kalakaua under the will of Kaniu he was entitled to an award.

Mr. Bates admitted that at the time of making the will the whole property was given to David—that at the time of her death she said to her husband, standing by at the time—that she wished him to take charge of all her property which she had willed to David

271 R. G. Davis sworn to as interpreter.

C. KANAINA, SWORN, says:

I knew Kaniu, I knew Kinimaka—I am the husband of Kekaulohi one of the late Premiers. I was present at the great division of the lands by the Chiefs. I am acquainted with the land called "Onoulimaloo" on Molokai. That land was Kaniu's at the time of her death. Kinimaka was not entitled to sit in the Council with the King. Kaniu was not one of the King's Chiefs in Council. Kaniu was a high Chiefess & related to Kahaumanu, but that she was not one of the King's high Councillor Chiefs. The land originally belonged to Kaniu but when the King wished to divide the lands he wished all people who had received lands to come in and get them granted. That in 1848 when they came in to get them divided and to get their grants Kaniu was dead and the reason Kinimaka got the land was because he appeared for her and her heirs. I understood the land then to belong to David. I knew Kinimaka almost up to the time of his death. Kinimaka never told me that land belonged to him. Kinimaka spoke to me as if the land was David's as the

mother had ordered it to be. Kinimaka acted as a sort of Steward to David to look out for his property. The King knew about this Kauoha (will) & the Queen & the men all about. I was sitting with the Premier at Lahaina when Kinimaka came to tell her the news about his wife's death, & he told her about Kaniu's will. Kinimaka told the Premier at that time that David was to be her heir. Plenty people were sitting by at the time.

By Mr. BATES:

When Kinimaka came to the King & Chiefs he gave in an account of his own private lands & at the same time he gave an acc't of the land. It was directed that David should be the Konohiki
272 under the King.—I always supposed that David was entitled to the land & this is a new thing Kinimaka claiming the land. Kinimaka was a favorite of the King.

(Mr. Bates admitted that David commenced an action as soon as he was of age against Kinimaka before he deceased.)

Kinimaka & Kaniu had no children. He afterwards married Pae—Kaniu had a daughter by Gov. Adams but she is now dead. Kaniu was considerably older than Kinimaka. She was not very old but she had no children.

Old Blue Law, pp. 47, 48, 49.

J. H. SMITH, sworn, says:

I was Secretary to the land Commission & am custodian of the Records of the Land Commission. I have the Records with me touching the matter in dispute. I refer to Land Commission No. 129 page 176, it contains the testimony relative to the lands in question which are marked in the bill as award 1602.

Mr. Davies interpreted the testimony as follows: Kekualaula was sworn, & said upon my request to Kaikuawa in 1834 for your place that it may be my place, because that place was a place lying open or waste. Haia consented to it & we fenced in the place, thereupon Kaniu went for it to the King but I did not know it. Kaikuawa came to me & said our work is done, that place is gone from us. The King's nurse Kaniu, that is all that I know about it up to the present time that we are now in. There was one person Lokai known something about this talk, but she did not get the thing, the King did not consent to it.

John Ii was sworn & said sometimes recently before Kaniu was sworn the place Haia had it—but he did not stop there
273 a short time when Haia was there only one house was built. I don't know who got it but I used to see Kaniu's people living there before the Law, and I heard from the daughter of Haia that the King had given it to Kaniu & it was accordingly gone.

Mr. Smith reexamined—

There was no other testimony given in regard to those lots. Kinimaka was the claimant. I don't know of any counter claimant. The date of the foregoing testimony was taken in Oct. 1846. Sometime turns out that the applicant to whom the land had been

awarded, had merely been the agent of the other parties. After the notification in the Newspaper the claim was allowed, if no counter claimants appeared. After the death of Mr. Richard's *death* no deliberations were taken, each Commissioner signed his award & it was signed by the others as a matter of course.—There are 3 lots awarded in the one award. They consist of two house lots on Punch-bowl St. & one down by the beach.

Mr. Davies Interpreted claim 240 K. p. 77. This claim was overlooked & was not entered before & this day in consequence of application having been made to the Privy Council & permission being given to enter it before the Land Commissioners therefore we do consent that the witness may be brought to this claim, that it may be made clear to the Land Comm'rs.

Mr. Smith reexamined—

It was customary to issue awards upon the Mahele book that was conclusive, & no evidence was required. No. 7130 is the number of the award of Onouli Maloo (p. 161) to Kinimaka, based on the division it was made upon the certificate of Thurston without any citation of witnesses to appear against it. This Onouli Maloo was only one of a number of lands awarded on that Certificate. I should suppose that Onouli Maloo is the one that C. Kanaina was testifying to. There is only one land of that name.

PUNIWAI, sworn, says:

I knew Kinimaka, & David & Kaniu,—David lived out at Kaniu's place after her death, until I grew up to a considerable age. I lived there all the time I was a boy & until a long time after I left school. I know all round the place until you come to a little pond. On the Ewa side the place abounds on a street that leads up to the church a Government St. & Leads past the Punch Bowl St. There is a fish pond on the Makai side the land goes to the fish pond. There are two houses on the lower side of it & then you come a little & there is a house where we brought David up & then you come to two more houses, & then you come to a house that is not a house. The house where the Boy was brought up was formerly the Chief house. It belongs to David. We the Kanakas all knew that it was David's house. Nawele, Kahina, & I, brought up David. Nawele kept him after Kaniu died. Kinimaka was in some way connected with David by his marriage with Kaniu. Kinimaka lived there under Kaniu & when she died we came in. Kinimaka lived on the place and looked out for it and we were the people under him. Kinimaka died on this place. Kaniu was the first Lord of the place and then Kinimaka & we under him. According to Kaniu's will the place was David's, but it was managed by Kinimaka. The place was David's but Kinimaka had all to do with it. Kinimaka thought the place was his, but Kaniu had willed it to David, but had instructed Kinimaka to take charge of it for David. I was there at the time she instructed him. Kinimaka was agreeable to that arrangement. Kinimaka left three children, they are young of different sizes.

275 KAHINA, sworn, says:

I lived upon the land in question up to Kinimaka's death, David lived there too. Kalakaua we looked upon as the owner of the place. The place belonged to David & Kinimaka a man under him. The way that Kinimaka had rights there was that he was Kaniu's death. That she willed the place to David and Kinimaka had charge of it for David. Kinimaka always declared to us that the place was David's and that he was to take charge of it while he, David, was young. Up to the time of Paki's death I never heard Kinimaka say the land was his, he might have laid claim for what I know but I never heard him say so. Kaniu was our chief, we were Kaniu's servants but after Kaniu's death Kinimaka was head man to take charge of the place for David.

We considered David our chief.

The Court adjourned until to-morrow at 10 o'clock.

JNO. E. BARNARD,

Clerk Sup. Court.

19TH AUGUST, 1858.

The Court met pursuant to adjournment.

Mr. Harris was allowed to amend his petition by — after the figures No. [129]* the words and figures "129 confirmed by Royal Patent".

Mr. Bates assented to the interlineation. Mr. Bates made the following point—admitt-d that the land originally belonged to Kaniu who held it as the King's Konobiki, that notice was given to the King of the death of Kaniu & of her having given her property to David. That at the time of the great division the King took back his title to the land. At that time nobody appeared to represent Kaniu—That the King was cognizant of the Will granting the land to David, but that when he delivered out the grants afresh he did not deliver one to David, but to Kinimaka. None of the

276 Chiefs set up any claim for David and when Kinimaka sent in his claim the King granted the lands to him. That David's natural Guardians stood by and made no objection to their being granted to Kinimaka. That after its having been awarded to Kinimaka, no appeal was taken against the award and they were now estopped.

Mr. Harris produced the Record in the former case against Kinimaka to show that an action had been commenced against Kinimaka previous to his death.

Mr. Harris stated that Kinimaka having assented to his wife that he would take charge of the land for David. That at the time she gave the land to David, or to Kinimaka for David, the King had not the power to take the land from her, that he, the King, would only have been entitled to one-third which was a sort of Legacy duty. That if Kaniu had had any idea that Kinimaka would not take charge of it as Guardian, she would have passed it at once to David

who she had adopted, overlooking Kapaakea her son. That David never lived with his father Kapaakea, & he Kapaakea claims no authority over him. That he always lived with Kaniu until her death. That Kinimaka having assumed the trusteeship was bound to make it know- on every occasion. That David having held a portion of Kaniu's land was possession of the whole, claimed whatever was contained in Royal Patent 1602 of Land Comm. Award No. 129.

JNO. E. BARNARD,

Clerk Supreme Court.

Endorsed: Supreme Court. David Kalakaua vs. Kinimaka. Proceedings. 18 Augt. 1858.

277

Supreme Court. In Equity.

DAVID KALAKAUA

vs.

RICHARD ARMSTRONG, Guardian of Kaniu, David Leleo, & Kinimaka, Minor Children of Kinimaka, Deceased.

Before Chief Justice E. H. Allen.

Now comes the Plaintiff in the above entitled cause, and in consideration of certain sums of money paid by Kinimaka during his lifetime, for his use and benefit, relinquishes all right to any and all land now included in the Estate of the said Kinimaka, and set forth in the petition in the above entitled cause. And discontinue my action for the same, saving and excepting the land of Onoulimaloo in the Island of Molokai and the 1st Apana of land set forth in Royal Patent No. 1602 filed in this cause.

And hereby discontinue my action as set forth in my Bill of Complaint, in the above entitled suit except for the said land of Onoulimaloo and for the Apana No. 1 Royal Patent No. 1602 hereinabove referred to.

DAVID KALAKAUA.

Nov'r 2nd, 1858. Supreme Court Room, Honolulu, Oahu.

Endorsed: Supreme Court David Kalakaua vs. Richard Armstrong Guardian of Kaniu, David Leleo & Kinimaka Minor children of Kinimaka, deceased. Discontinuance except for land Onoulimaloo & Apana 1 Royal Patent No. 1602. Filed 2nd Nov'r 1858. Jno. E. Barnard, Clerk Sup. Court.

Supreme Court.

(In Equity.) At Chambers, 2 Nov'r, 1858.

DAVID KALAKAUA

vs.

RICHARD ARMSTRONG, Guardian of Kaniu, David Leleo, & Kinimaka, Minor Children of Kinimaka, Deceased.

Before Hon. E. H. Allen, Chief Justice.

The Court did order adjudge and decree in this matter that Mr. Armstrong, as Guardian of Kaniu, David Leleo and Kinimaka, Minor Children of Kinimaka deceased, do convey to David Kalakaua the plaintiff in this cause, the land named Omulimalo on the Island of Molokai, and the first Apana of land set forth in Royal Patent No. 1602 filed in this cause.

JNO. E. BARNARD,

Clerk Supreme Court.

Endorsed: Supreme Court. David Kalakaua vs. Richard Armstrong, Guardian of Kaniu, David Leleo & Kinimaka, Minor Children of Kinimaka dec'd. Proceedings. 2 Nov'r 1858.

APPENDIX E.

In the Circuit Court of the First Judicial Circuit, Territory of Hawaii.

At Chambers. In Equity.

KAPIOLANI ESTATE, LIMITED, Plaintiff,

vs.

MARY H. ATCHERLEY, Defendant.

Bill for Injunction, &c.

Amended Bill.

To the Honorable A. S. Humphreys, First Judge of the Circuit Court of the First Judicial Circuit, Territory of Hawaii, Sitting in Chambers:

Your petitioner, the Kapiolani Estate, Limited, a corporation having its place of business in Honolulu, Island of Oahu, Territory of Hawaii, for an amended complaint herein, as per stipulation between the parties hereto, dated the — day of April A. D. 1902, on file in this case in court, represents and says:

1. That the defendant herein is a resident of Honolulu, Island of Oahu, Territory of Hawaii.

2. That on the 31st day of July A. D. 1901 said defendant herein filed an action of Ejectment against the plaintiff herein in the Circuit court of the first Judicial Circuit to recover possession of a certain parcel of land situate on Queen street, in Honolulu aforesaid, a copy of the declaration in ejectment in said action being hereto annexed and made a part hereof, the land covered by
 280 said declaration being land claimed by the plaintiff in fee simple, and being also claimed in fee simple in said action of ejectment by defendant as aforesaid.

That said land is bounded and described as follows:

Apana 1, on Punchbowl street, commencing at the south corner of Queen and Punchbowl streets, and running S. 68 W. 7 chains 42 3/12 feet to the mauka side of the fish pond of H. Kalama, joining Punchbowl street; thence along the mauka edge of said pond S. 52 E. 4 chains 50 2/12 feet to the west corner of lot of Ke; thence N. 47 E. 2 chains 20 feet, N. 31 W. 23 9/12 feet, and N. 47 3/4 E. 4 chains 2 8/12 feet; all these lines join the house lot of Ke; thence — 49 1/4 W. 39 7/12 feet to commencement, and containing an area of, to wit 2.32 acres.

3. That on or about the 29th day of December A. D. 1856 one David Kalakaua under and through whom the plaintiff claims title to the land named in paragraph 2 of this bill, litigated his title to said land with the following parties, under whom the defendant claims title to said land, to-wit, Kinimaka, and Pai, his wife, and their children hereinafter named, said litigation taking place in the Supreme Court of the then Hawaiian Islands, in equity; and, in this behalf and connection, and more particularly, the plaintiff alleges that, on the 29th day of December A. D. 1856, said David Kalakaua filed his petition in equity in the Supreme Court of the Hawaiian Islands against the said Kinimaka, claiming that the said Kinimaka held title to the land named in paragraph 2 of this bill in trust and as the guardian, of said Kalakaua, and not otherwise, and praying that said Kinimaka might be declared trustee of said land for said David Kalakaua, and that he might be decreed to convey the same in fee to the said David Kalakaua in execution
 281 of the trust alleged and set up as aforesaid in said bill of complaint, which said bill of complaint, or petition, marked Exhibit A, is hereto attached and made part hereof.

4. That, upon this petition, a summons was thereafter duly issued and served, a copy of which summons, marked Exhibit "B," is hereto attached and made a part hereof.

5. Your petitioner is informed and believes, and upon such information and belief alleges; that thereafter, to-wit, on or about January 24th, 1857, after service of the aforesaid petition, and before filing an answer thereto, the said Kinimaka died.

6. Your petitioner is informed and believes, and upon such information and belief alleges, that the said Kinimaka, at the time of his decease, left him surviving a widow, Pai, and, as his devisees, three children, to-wit, Kaniu Kinimaka (w), David Leleo Kinimaka, and Moses Kapaakea Kinimaka, to which said children the said Kinimaka devised all his real estate including the property

in question. The will of said Kinimaka, together with all of the papers, exhibits and pleadings on file in the Supreme Court of the Hawaiian Islands in the Estate of said Kinimaka being made a part of this bill of complaint, plaintiff craving leave to refer thereto without incorporating said records more formally and fully in this complaint.

7. That the said David Kalakaua claimed that, under said will of said Kinimaka, his said children and widow then and there became trustees of the property which is the subject matter of this bill of complaint, for the benefit of said David Kalakaua, and in the same manner and under the same trusts as formally held by said Kinimaka.

8. That thereafter and on the 16th day of March 1857 said David Kalakaua filed a suggestion in the Supreme Court of the then Hawaiian Islands, in equity, to the effect that said Kinimaka
282 had deceased before answering his original petition filed as aforesaid on the 29th day of December 1856; that the said Kinimaka had left, surviving him, a widow, Pai, and three minor children, as heirs by the will of him, the said Kinimaka, and praying that the said widow and children be made parties to said original suit, and that a guardian ad litem be appointed for said children; a copy of which suggestion, marked Exhibit "C," is hereto annexed and *part a part* hereof.

9. That thereafter, to-wit, on March 8th, 1858, the said David Kalakaua filed a petition for the administration of the Estate of one Kaniu, deceased, under whom said Kalakaua claimed said land, and for the appointment of an administrator, and for the appointment of a guardian ad litem for the three minor children of Kinimaka, deceased. A copy of said petition, marked Exhibit "D" is hereto annexed and made a part hereof.

10. That, upon reading and filing the said petition an order was made appointing George E. Beckwith administrator of the Estate of Kinimaka, deceased, guardian ad litem of the three minor children of the said Kinimaka. A copy of said order, marked Exhibit "E," is hereto annexed and made a part hereof.

11. That upon this petition, to-wit, the petition set forth in paragraphs 9 and 10 of this bill, a summons was duly issued, citing George E. Beckwith, administrator of the Estate of Kinimaka, deceased, and guardian ad litem of the minor children, and Pai, the widow of said Kinimaka; a copy of which summons, marked Exhibit "F," is hereto annexed and made a part hereof.

12. That upon this petition a hearing was afterwards had and evidence taken. A copy of the record of the proceedings and
283 of the evidence taken thereat, marked Exhibit "G," is hereto annexed and made a part *a part* hereof.

13. That thereafter a decree was rendered in the said cause by the Honorable G. M. Robertson, and duly filed, adjudging the said David Kalakaua to be the devisee of the said Kaniu, deceased and directing letters testamentary to be issued to him. A copy of said judgment and decree, marked Exhibit "H," is hereto attached and made a part hereof.

14. That thereafter, to-wit, on May 3d, 1858, letters testamentary were duly issued to the said David Kalakaua, as administrator of the Estate of Kaniu, deceased; a copy of said letters testamentary, marked Exhibit "I," being hereto attached and made a part hereof.

15. That afterwards, to-wit, upon June 19th, 1858, the said David Kalakaua filed a further petition alleging substantially the same facts as in the petitions of December 29th, 1856, and of March 16, 1857, with the additional fact that one Richard Armstrong had been appointed guardian of the minor children, and praying that he, as such, might be ordered to convey the said lands now in question to the said petitioner, David Kalakaua. A copy of said petition, marked Exhibit "J," is hereto annexed and made a part hereof.

16. That upon this petition a summons was duly issued and served upon Richard Armstrong as guardian of the said minor children of Kinimaka, and Pai; a copy of which said summons, marked Exhibit "K," is hereto annexed and made a part hereof.

17. That thereafter the defendants duly filed an answer to said petition; a copy of which said answer, marked Exhibit "L," is hereto annexed and made a part hereof.

18. That thereafter, to-wit, upon August 18th, 1858, in chambers, before the Honorable E. H. Allen, Chief Justice of the Supreme Court of the Kingdom of Hawaii, evidence was taken, and the cause was heard upon the merits. A copy of the records of the proceedings in said cause and the evidence taken therein, marked Exhibit "M," is hereto annexed and made a part hereof.

19. That thereafter, to-wit, upon November 2d, 1858, the Honorable E. H. Allen, Chief Justice, in Chambers, adjudged and decreed as follows—which decree was duly entered upon the records of said court: "David Kalakaua against Richard Armstrong, guardian of David Leleo, Kaniu, and Kinimaka, minor children of Kinimaka, deceased. The court did order, adjudge and decree in this matter that Mr. Armstrong, the guardian of David Leleo, Kaniu, and Kinimaka, minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this case, the land named Onoulimaloo, on the Island of Molokai, and the first Apana of land set forth in Royal Patent 1602 filed in this cause. John E. Barnard, Clerk of the Supreme court." A copy of said decree, marked Exhibit "N," is hereto attached and made a part hereof.

20. That the said Richard Armstrong, was, in fact, at that time the duly appointed guardian of the said minor children, having been appointed thereto by the Honorable G. M. Robertson on May 5th, 1858, upon the petition of Pai, the widow of said Kinimaka and the mother of said minor children. A copy of said petition, marked Exhibit "O," and a copy of said appointment marked Exhibit "P," being hereto annexed and made parts hereof; and the entire record, including all of the papers and exhibits of said guardianship matter as now on file in the Supreme Court of the Hawaiian Islands, in equity, being made a part hereof, and complainant craving leave to refer to the same as if the same were more formally and fully incorporated in this bill of complaint.

285 21. That it does not appear from the records either of the court or in the Registry of deeds, in Honolulu, Hawaiian Islands, that the said decree of the Supreme Court directed against Richard Armstrong as guardian of said minor children of Kinimaka, deceased, and ordering a conveyance of the property to said David Kalakaua, was, in fact, obeyed by the said Richard Armstrong, but, after said decree was made, the said David Kalakaua ceased to be molested in any way by either the widow and heirs aforesaid of said Kinimaka, or by the said Armstrong in their behalf, and retained open, notorious and undisputed possession, and dealt with the said land in all ways as his own, and continued so to do until he disposed of the said property.

And complainant hereby makes all papers, pleadings and exhibits of whatsoever kind in said equity proceedings a part of this bill of complaint, and makes profert thereof, and asks leave to refer — the same as fully and effectually as if actually incorporated in extention in this bill of complaint.

And, in this connection, the complainant attaches hereto a copy of the original land commission award and royal patent, and copies of the original record of evidence given before the Land Commission in support of said land commission award and royal patent, the same being referred to and made a part of the evidence in said equity proceedings instituted in the years 1856 and 1857 above referred to, which said copies are made a part of this bill of complaint, being marked respectively Exhibits "Q", "R" and "S".

286 22. That the successors in title of the said David Kalakaua have at all times retained and been in open, notorious and, until on or about January first, 1900, undisputed possession of the said property, and have, in all ways, dealt with it as their own; that the petitioner herein is a bona fides purchaser for a valuable consideration, and without notice of the aforesaid property, and that it claims title thereto from the said David Kalakaua as follows, to-wit: by a deed from David Kalakaua to Luakini and wife, dated March 9th, 1868, and recorded in Oahu Registry of deeds, book 25, page 332; by a deed from Luakini and wife to Kapiolani dated April 1st, 1868, and recorded in Oahu Registry of deeds, book 25, page 336; by a deed from Kapiolani to David Kawananaokoa and Jonah Kalaniana'ole, dated February 10th, 1898, and recorded in Oahu Registry of deeds, book 176, page 232; by a deed from David Kawananaokoa and Jonah Kalaniana'ole to E. H. Wodehouse, dated July 12, 1898, and recorded in Oahu Registry of deeds book 181, page 294; by a deed from E. H. Wodehouse to David Kawananaokoa and Jonah Kalaniana'ole, dated June 25th, 1899, and recorded in Oahu Registry of deeds, book 195, page 233; by a deed of David Kawananaokoa and Jonah Kalaniana'ole to Kapiolani Estate, Limited, dated August 7th, 1899, and recorded in Oahu Registry of deeds, book 194, page 427.

23. Your petitioner is informed and believes, and upon such information and belief alleges, that the said children of the said Kinimaka, to-wit, Kaniu, David Leleo, and Moses Kapaakea, to whom the said Kinimaka devised his interest in the said property in ques-

tion, to-wit, his bare legal title therein, which the said children received and held in trust for the said David Kalakaua and his successors in title, were at all times well aware that the said David Kalakaua and his successors were in the said open, notorious and undisputed possession of said property, and dealing with it as their own.

24. That the said Kaniu Kinimaka attained the age of majority about the year 1867; that the said David Leleo Kinimaka attained the age of majority about the year 1871; that the said Moses Kapaakea Kinimaka attained the age of majority about the year 1877; that, at no time did they or any of them assert any claim in or to any of the said lands, or in any way deny the rights of the said David Kalakaua and his successors in title thereto, but, they at all times acquiesced in the open, notorious and undisputed possession and claim of the said David Kalakaua, and his successors in title in and to all of the aforesaid property.

25. That by the will of the said Kinimaka aforesaid all of his property was devised to his said daughter, Kaniu, for her lifetime, and then to his son, David Leleo Kinimaka, for his lifetime, and the remainder to his son, Moses Kapaakea Kinimaka; that the said Moses Kapaakea Kinimaka, claiming to own the land in question, sold his alleged estate in remainder to defendant May 18th, 1897, by deed recorded in the office of the Registry of conveyances in Honolulu, book 167, page 368; that the said David Leleo Kinimaka died before Kaniu Kinimaka; that on January 4th, 1901, said Kaniu Kinimaka died, and the defendant herein claims that, by reason of her death, a fee simple estate is vested in her, the defendant, with the right of immediate possession under and by virtue of said deed to her, said defendant, from said Moses Kapaakea Kinimaka.

26. That the said plaintiff in the present cause has a clear and unbroken chain of title to the said lands by mesne conveyances from Kalakaua, Luakina and wife, Kapiolani, David Kawananaokoa and Jonah Kalaniana'ole, and E. H. Wodehouse; all of which deeds are duly recorded in the office of the registry of deeds, and that said plaintiff has, today, all the right, title and interest formally held by the said David Kalakaua in and to the said lands.

27. That owing to the failure on the part of the said Richard Armstrong as guardian of the children, David Leleo, Kaniu, and Moses Kapaakea Kinimaka, of Kinimaka, deceased, and his devisees of the land in question, to convey of record their interest as ordered by the court, plaintiff's record of chain of title from the deceased to him, by virtue of the above mentioned decree, through which plaintiff claimed, is incomplete.

28. That by the said actions in ejectment the defendant seeks to take unconscionable advantage of the above mentioned technical error in the chain of title of your petitioner. That said claims constitute a cloud upon the title of petitioner in and to the land aforesaid, and that defendant is using the fact that the legal title to said land is in her as aforesaid to harass plaintiff with litigation,

and to cloud its title and to shut plaintiff out of the due and full enjoyment of the same.

29. That it would be inequitable to allow the present defendant to prosecute her action of ejectment until the bare legal title to the property in question which she is holding wrongfully, and against the right of the petitioner, and as naked trustee thereof, should by her be conveyed to said petitioner.

30. That owing to the above recited facts, and to the fact that the present defendant is a married woman, your petitioner herein has no plain, complete and adequate remedy at law.

31. That for this court to issue its restraining order as herein prayed for would avoid a multiplicity of suits in the premises, and work no inequity to the defendant.

Wherefore, and in as much as your petitioner is remediless by the strict rules of the common law, and can have relief only in such court of equity, where such matters are properly cognizable, your petitioner prays that the process of this Honorable court may issue against said defendant, summoning her to appear and answer this complaint, and be bound by the proceedings thereunder, and to abide by all further orders and decrees of this Honorable court.

(b) That a temporary injunction may issue out of this Honorable court, restraining the defendant herein, her counsellors, solicitors, attorneys and agents, from the further prosecution of her action in ejectment until the further order of this court.

(c) That a permanent injunction may issue out of this Honorable court restraining the defendant herein from proceeding with any further action at law under any claim of title to the aforesaid lands derived either directly or indirectly through Kinimaka, deceased.

(d) That the defendant herein may be declared to be the trustee of all the right, title and interest of the said Kaniu Kinimaka, David Leleo Kinimaka and Moses Kapaakea Kinimaka, in and to the lands in question, for the benefit of the petitioner, as a cestui que trust, and that as such trustee she may be ordered to convey all such interests to the said petitioner.

(e) That this Honorable court may order and decree to the petitioner any such further and other relief as to this court may seem proper in the premises, together with the costs incurred in this suit

KAPIOLANI ESTATE, LTD.,
By Its Treasurer, JOHN F. COLBURN.

KINNEY, BALLOU & McCLANAHAN,
Att'ys for Pl'ff.

290 ISLAND OF OAHU,
Territory of Hawaii, ss:

John F. Colburn, being first duly sworn, on oath deposes and says: That he is the Treasurer of the Kapiolani Estate, Limited; that he has read the foregoing bill of complaint, and knows the contents thereof, and that all the matters and things therein alleged are true,

except as to those matters and things alleged on information and belief, and, as to those matters, he believes them to be true.

JOHN F. COLBURN.

Subscribed and sworn to before me this 16 day of April A. D. 1902.

[SEAL.]

CARLOS A. LONG,
Notary Public, First Judicial Circuit.

Endorsed: Circ't Ct. 1st Circ't. In Equity. Kapiolani Est. Ltd. vs. Mary H. Atcherley. Amended bill for Injunction & C. E. 1246 18/410. Filed April 16, 1902. A. G. Kaulukou, Clerk.

291

EXHIBIT "Q."

Helu 129, Kinimaka.

Ua koi mai oia no kona mau whai ma Honolulu no ka mea, ua loaia ia ia keia mau whai maa ka makahiki 1834, a ua noho keakea ole ia a hiki i keia manawa.

Oia ka makou e hooko nei no Kinimaka he kuleana hoi kona malalo o ke ano Alodio. Ina e uku mai oia i ko ke Aupuni hapaha, alaila ua kupono ia ia ka palapala Sila Alodio.

Pono no nae ia ia ke uku no ka hookolokolo a me ka hooholo ana i ka olelo Penei,

	No ka rumi a me ke pai ana i ka olelo ma ka Nupepa.....	\$1.
J. H. Smith.	No ke kope ana i ka olelo koina.....	
S. M. Kamakau.	2 Aoao	1.
Z. Kaauwai.	No ka palapala kii.....	.50
Ioane Ii.	No ka hana ana i ka la 24 Okatoba 1846	1.
No ke kope ana i ka olelo a na hoike 2 aoao.....		1.50
No ke ana ana i ka la.....		2.50
No ke kope ana.....		.50
No ka hooholo ana i ka olelo Aperila 10, 1849.....		2.50
		<hr/>
		\$10.50

Eia na palena

Anaia e D. Kalanikahua.

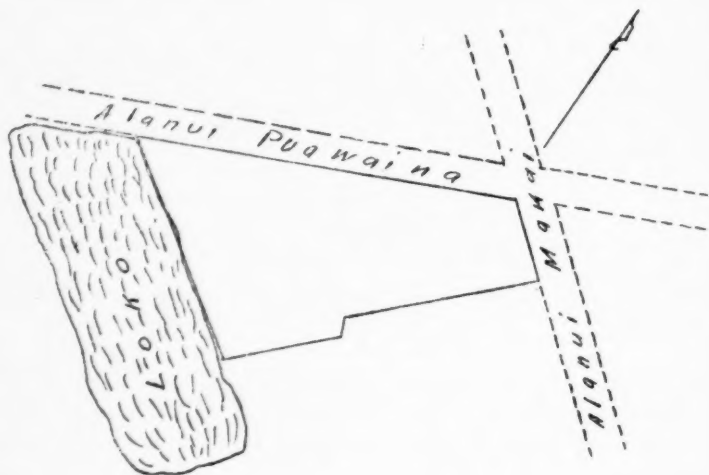
Apana 1.

Ke ano o ke ana ana i kekahi Apana pahale o Kinimaka ma Honolulu, i Oahu. Ma ka aoao makai o ke Alanui makai ma ka aoao Hema hoi o ke Alanui Puawaina. E hoomaka ana i ke ana ana ma ka huina Hema, e hui ai ke Alanui maki me ka Alanui Puawaina. A moe aku ka aoao Hema 68° Komohana 7 Kaulahao 43 $\frac{3}{12}$

292 Kapuai hiki ma ka aoao mauka o ka loko iaa H. Kalama, e pili ana no i ke Alanui Puawaina, huli a holo ma ka lihi mauka o ua loko la Hema 52° Hikina 4 Kaulahao 50 $\frac{2}{12}$

Kapuai hiki i ke kihi Komohana o ka pa o Ke e pili ana no i ka loko ia, huli Akau 47° Hikina 2 Kaulahao 29 Kapuai huli Akau 31° Komohana, a holo iki 23 $\frac{9}{12}$ Kapuai, huli Akau 47° $45'$ Hikina 4 Kaulahao 2 $\frac{8}{12}$ Kapuai, e pili ana ia pae aoao a pau i ka pahale o Ke, alaila huli i kahi i hoomaka'i ke ana ana Akau 49° $15'$ Komohana 1 Kaulahao 39 $\frac{7}{12}$ Kapuai.

Eia ka ili 2 Eka 2 Kaulahao 28 Anana 15 Kapuai.

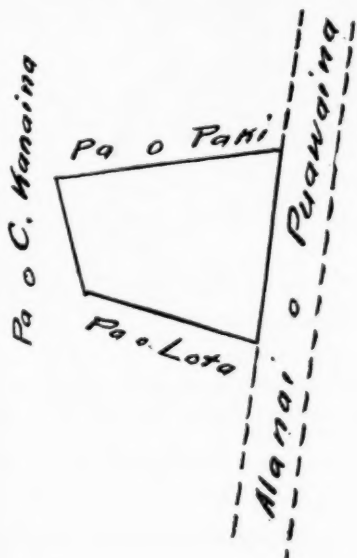


293

Apana 2.

Ke ano o ke ana ana i kekahi Apana pahale o Kinimaka ma Honolulu i Oahu ma ka Aoao Akau o ke Alanui Puawaina makai hoi o ka pa o Paki mauka iho hoi o ka pa o Lota. E hoomaka ana i ke ana ana ma ke kihi Hema o ka pa o Paki, ma ka aoao Akau hoi o ke Alanui Puawaina. A moe aku ka aoao mua Akau $35^{\circ} 30'$ Komohana 2 kaulahao $45 \frac{6}{12}$ Kapuai hiki i ke kihi Kikina o ka pa o C. Kaniaua huli Hema 53° Komohana 1 Kaulahao $24 \frac{5}{12}$ Kapuai hiki i ke kihi Akau o ka pa o Lota, huli Hema $14^{\circ} 30'$ Hikina 2 kaulahao $18 \frac{6}{12}$ Kapuai hiki i ke kihi Hikina o ka pa o Lota, alaila huli i kahi i hoomaka'i ke ana ana Akau $68^{\circ} 15'$ Hikina 2 Kaulahao $15 \frac{10}{12}$ Kapuai.

Eia ka ili 545 Anana 12 Kapuai.



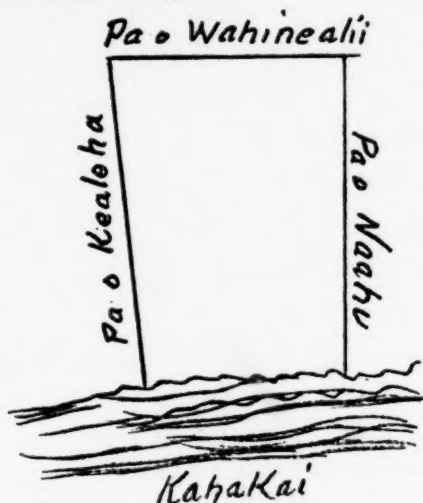
294

Apana 3.

Ke kii o ka pahale o Kinimaka ma Honolulu i Oahu e pili ana i ke Kahakai, aia makai iho o ka pa o Wahinealii ma Waikiki hoi o ka pa o Kealoha ma Ewa hoi o ka pa o Naahu. E hoomaka ana i ke ana ana ma ke kihi Hema o ka pa o Kealoha e pili ana i ke kahakai. A moe aku ka aoao mua Akau $61^{\circ} 30'$ Hikina 1 Kaulahao $60 \frac{9}{12}$ Kapuai, hiki i ke Komohana o ka pa o Wahinealii, huli Hema $22^{\circ} 30'$ Hikina 1 Kaulahao $21 \frac{9}{12}$ kapuai, hiki i ke kihi Hema o ka pa o Wahinealii, huli Hema $69^{\circ} 30'$ Komohana 1 kaulahao $53 \frac{6}{12}$ kapuai hiki i ke kihi Komohana o ka o

Naahu e pili ana i ke kahakai alaila huli i kahi i hoomakawa'i Akau
27° Komohana 1 kaulahao 9 3/12 kapuai.

Eia ka ili 278 Anana 11 Kapuai.



Pono nae iaia ke uku mai no ka hookolokolo ana a me ka hooholo
ana iho i ka olelo Penei.

No keia mau Apana 2, 3, \$10.5

A true translation of which Award is as follows:

295

Number 129, Kinimaka.

He has claimed as his certain premises at Honolulu on the ground
that he received these premises in the year 1834, and has had un-
disturbed possession up to this time.

In these lands we award to Kinimaka a freehold estate less than
allodial. Should he pay the government communication, a Patent
will be issued to him in fee simple.

But it is proper for him to pay for the hearing and the deciding
of the claim. Thus,

	For advertising the claim in the news- paper	\$1.0
	For recording the claim 2 pages.....	1.0
	For the diagram.....	.5
Wm. L. Lee.	For working the 24th day of October, 1846	1.0
J. H. Smith.	For recording the testimony of the wit- nesses 2 pp.	1.5
S. M. Kamakau.	For surveying one day	2.5
Z. Kaauwai.	For recording5
Ioane Ii.	For deciding the claim April 10, 1849.	2.5
		<hr/> 10.0

296 These are the boundaries,
Survey by D. Kalanikahua.

Lot 1.

Survey of a houselot of Kinimaka in Honolulu, Oahu, on the lower side of Makai St. and the south side of Punchbowl St. Beginning the survey at the south corner of the junction of Makai and Punchbowl streets and running,

S. 68° W. 7 chains 48 $\frac{3}{12}$ feet to the upper sides of the fish pond of H. Kalama, adjoining Punchbowl St. turn and run along the upper edge of said pond S. 52° E. 4 chains 50 $\frac{2}{12}$ ft. to the West corner, of the lot of Ke adjoining the fish pond; turn N. 47° E. 2 chains 29 ft. turn N. 31° W. and run a little, 23 $\frac{9}{12}$ feet, turn N. 47° 45' E. — chains 2 $\frac{8}{12}$ ft.; all those sides join the house lots of Ke; thence turn to place of beginning. N. 49° 15' W. 1 chain 39 $\frac{7}{12}$ ft. Area 2 acres 2 chains 28 fathoms, 15 feet.

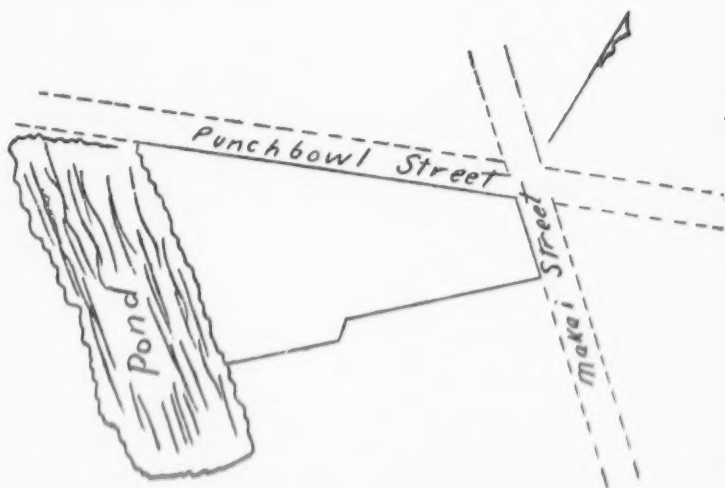


297

Lot 2.

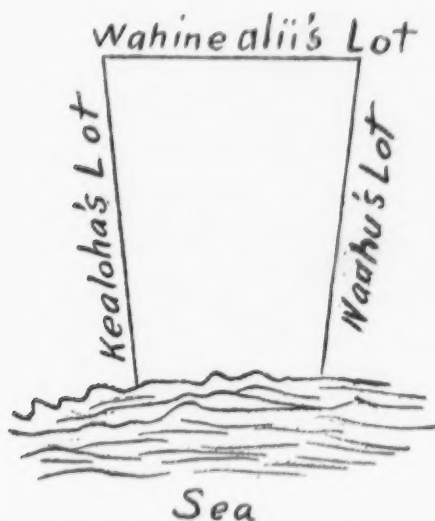
Survey of a houselot of Kinimaka situate on the north side of Punchbowl St. and below the lot of Paki, and above the lot of Lota; Beginning the survey on the South corner of the lot of Paki, and the north side of Punchbowl St., the first side lies,

N. $35^{\circ} 30'$ W. 2 chains $45 \frac{6}{12}$ ft. to the east corner of the lot of C. Kanaina turn S. 53° W. 1 chain $24 \frac{5}{12}$ ft. to the north corner of the lot of Lota; turn S. $14^{\circ} 50'$ E. 2 chains $18 \frac{6}{12}$ ft. to the south corner of the lot of Lota; then turn to place of beginning. N. $68^{\circ} 15'$ E. 2 chains $15 \frac{10}{12}$ ft. Area 545 fathoms 12 feet.



The plan of the house lot Kinimaka at Honolulu, Oahu, joining the beach which is makai of the lot of Wahinealii and Waikiki of the lot of Kealoha and Ewa of the lot of Naahu. Beginning the survey at the south corner of the lot of Kealoha adjoining the beach the first side lies,

N. $61^{\circ} 30'$ E. 1 chain $60 \frac{9}{12}$ feet to the west side of the lot of Wahinealii; turn S. $22^{\circ} 30'$ E. 1 chain $21 \frac{9}{12}$ feet to the south corner of the lot of Wahinealii; turn S. $67^{\circ} 30'$ W. 1 chain $53 \frac{6}{12}$ feet to the west corner of Naahu adjoining the beach; thence turn to place of beginning. N. 27° W. 1 chain $9 \frac{3}{12}$ feet. Area 278 fathoms 11 feet.



It is proper for him to pay for the hearing and deciding the claim thus,

For these lots, 2, 8..... \$10.50

299

EXHIBIT "R."

Helu 1602.

Palapala Sila Nui

A ke Alii, Mamuli o ka Olelo a ka Poe Hoona Kuleana.

No ka Mea, Ua hoooho na Luna Hoona i na kumu kuleana aina i ka olelo, he kuleana oiaio ko Kinimaka Kuleana Helu 129, ma ke ano Kuleana Nui malalo o ke Ano Alodio—iloko o kahi I oleloia malalo, a no ka mea ua haawi mai o ua Kinimaka nei, iloko o ka Waihoana Dala Aupuni i Kanawalu Kumamalu 50/100 dala no ke Aupuni Kuleana iloko o ia aina.

No laila, ma keia Palapala Sila Nui, ke hoiike nei o Kamehameha III ke Alii Nui a ke Akua i kona lokomaikai i hoonoho ai maluna o ko Hawaii Pae Aina, ina kanaka apau, i keia la nona iho, a no kona mau hope Alii ua hoolilo, a ua haawi aku oia, ma ke ano alodio ia Kinimaka i kela wahi a pau loa ma Honolulu ma ka Mokupuni o Oahu penei na mokuna:

Apana 1—ma Ala Puawaina. E hoomaka ma ka huina Hema o ke Ala Aliiwahine me ke Ala Puawaina, a e holo Hema 68° Kom.

7 Kaul 42 3/12 kapuai hiki i ka aoao mauka o ko loko ia a H. Kalama, e pili ana no i ke Alanui Puawaina, alaila ma ka lihi mauka o ia loko Hema 52° Hik. 4 Kaul. 50 2/12 kapuai, hiki i ke kihi Kom. o ka pa o Ke, alaila Akau 47° Hik. 2 Kaul. 29 Kapuai. Akau 31° Kom. 23 9/12 Kaul. a Akau 47 3/4° Hik. 4 Kaul. 2 8/12 Kapuai, e pili ana ia pae aoao apau i ka pahale o Ke, alaila Akau 49 1/4° Kom. 39 7/12 Kapuai a hiki i ka hoomaka ana.

2.52 Eka.

300 Apana 2—ma Ala Puawaina. E hoomaka ma ke kihi Hema o ka pa o Paki, ma ke aoao Akau hoi o ka ala Puawaina, a e holo Akau 35 1/2° Kom. 2 Kaul. 45 6/12 Kapuai, hiki i ka pa o Kanaina, alaila Hema 53° Kom. 1 kaul 24 5/12 kapuai, hiki i ka pa o Lota, alaila ema 14 1/2° Hik. 2 Kaul. 18 6/12 kapuai hiki i ke ala Puawaina, alaila Akau 68 1/4° Hik. 2 Kaul. 15 10/12 kapuai a hiki i kahi i hoomaka'i.

545 Anana.

Apana 3—ma Kahakai. E hoomaka ma ke kihi Hema o ka pa o Kealoa, e pili ana me kahakai, a holo Akau 61 1/2° Hik. 1 Kaul 60 9/12 kapuai hiki i ke kihi Kom. o ka pa o Wahinealii alaila, Hema 22 1/2° Hik. 1 Kaul. 21 9/12 kapuai, hiki i ka pa o Naahu, alaila Hema 67 1/2° Kom. 1 Kaul. 53 6/12 kapuai ma ia pa a hiki i kahakai, alaila Akau 27° Kom. 1 Kaul. 9 3/12 kapuai a hiki i kahi i hoomaka'i.

278 Anana.

Maloko oia mau Apana 3.20 Eka a oi, iki aku, a emi iki mai paha. Ua koe nae i ke Aupuni na mine minerala a me na metala a pau.

No Kinimaka ua aina la i haawila ma ke ano Alodio.—a no kona mau hoolina, ame kona waihona; ua pili nae ka auhau a na Poe Ahaoelo e kau like ai ma na aina alodio i kela manawa kela manawa.

A i mea e ikeai ai, ua kau wau i ko'u inoa, a me ka Sila Nui o ko Hawaii Pae Aina ma Honolulu i kela la 30 o Augate 1853.

Inoa: KAMEHAMEHA.

Inoa: KEONI ANA.

A true translation of which Royal Patent is as follows:

301

Number 1602.

Royal Patent

Of the King in accordance with the report of the Land Commissioners.

Whereas the Board of Commissioners to Quiet-Land titles has awarded to Kinimaka by Award No. 129 a freehold estate less than allodial in the premises mentioned below; and,

Whereas, Kinimaka has paid into the government treasury eighty-two and 50/100 Dollars for the government's rights in said land,

Therefore by this Royal Patent Kamehameha III, the Great King

over the Hawaiian Islands by the Grace of the Lord, shows to all men this day for himself and his kingly successors that he has conveyed and granted in fee simple to Kinimaka that land at Honolulu on the Island of Oahu with these boundaries.

Lot in Punchbowl St. commencing at the south corner of Queen and Punchbowl Streets and running; S. 68° W. 7 chains 42 $\frac{3}{12}$ ft. to the upper side of the fishpond of H. Kalama adjoining Punchbowl St. thence along the upper edge of said pond; S. 52° E. 4 chains 50 $\frac{2}{12}$ ft. to the west corner of the lot of Ke; thence N. 47° E. 2 chains 29 ft. N. 31° W. 23 $\frac{9}{12}$ ft. and N. $47\frac{3}{4}^{\circ}$ E. 4 chains 8 $\frac{1}{12}$ ft.; all these sides join the house lot of Ke; thence N. $49\frac{1}{4}^{\circ}$ W. 39 $\frac{7}{12}$ ft. to commencement 2.52 acres.

Lot 2 on Punchbowl St. commences at the south corner of the lot of Paki and north side of Punchbowl St. and run; N. $35\frac{1}{2}^{\circ}$ W. 2 chains 45 $\frac{6}{12}$ — to the lot of Kanaina; thence S. 53° W. 1 chain 24 $\frac{5}{12}$ ft. to lot of Lota; thence S. $\frac{1}{4}^{\circ}$ E. 2 chains 15 $\frac{10}{12}$ ft. to place of commencement.

545 fathoms.

Lot 3 at Beach.

Commencing at the south corner of the lot of Kealaha adjoining the beach and running N. $61\frac{1}{2}^{\circ}$ E. 1 chain 60 $\frac{9}{12}$ ft. to the west corner of the lot of Wahine III, thence S. $22\frac{1}{2}^{\circ}$ E. 1 chain 21 $\frac{9}{12}$ ft. to lot of Noahu; thence S. $67\frac{1}{2}^{\circ}$ W. 1 chain 53 $\frac{8}{12}$ ft. along that lot to beach; thence N. 27° W. 1 chain 9 $\frac{3}{12}$ ft. to place of commencement.

278 fathoms.

Within these lots 3.20 acres more or less. All mineral and metal mines are reserved to the Government. This land is Kinimaka's. It is granted in fee simple to him, his heirs and devisees, subject however, to the tax laid by the legislature from time to time upon fee simple land.

In witness whereof I have put here my name and the great seal of the Hawaiian Islands this 30th day of August 1858,

Name: KAMEHAMEHA.

Name: KEONI ANA.

EXHIBIT "S."

Copy of Transfer in Mahele Book.

" Ko Kamehameha.

Na Aina.	Ahupuaa.	Kalana.	Mokupuni.
Kukuiwaluhia	"	Kohala	Hawaii.
Keahi.....	"	Hamakualoa	Maui.
Aleamai.....	"	Hilo.....	Hawaii.
Wainuku.....	"	Kau	Hawaii.
Kahilipali.....	"	"	"
Ponahawai	"	Hilo.....	"
Kalaoa.....	"	Kona.....	"
$\frac{1}{2}$ Keana.....	"	Koolau	Oahu.

Ke ae aku nei au i keia mahele ua maikai.

No ka Moi na aina i kakauia maluna, aohe ou kuleana maloko.

KINIMAKA.

Hale Alii, Feb. 9, 1848.

A true translation of which is as follows:

" For Kamehameha.

The lands.	Ahupuaa.	Kalana.	Island.
Kukuiwaluhia.....	"	Kohala	Hawaii.
Keahi.....	"	Hamakualoa.....	Maui.
Aleamai.....	"	Hilo.....	Hawaii.
Wainuku	"	Kau.....	"
Kahilipali.....	"	"	"
Ponahawai	"	Hilo.....	"
Kalaoa.....	"	Kona.....	"
$\frac{1}{2}$ Keana.....	"	Koolau-loa.....	Oahu.

I hereby assent to this division. It is good.

To the King are the lands above written, I have no right therein.

KINIMAKA.

Palace, Feb. 9, 1848.

304

"Ko Kinimaka.

Na Aina.	Ahupuaa.	Kalana.	Mokupuni.
Maihi	"	Kona	Hawaii.
Kalahiki	"	"	"
Onouli, malo	"	Molokai.
½ Keana	"	Koolau Loa	Oahu.

Ke ae aku nei au i keia mahele ua maikai.

No Kinimaka na Aina i kakauia maluna, ua ae ia'ku e biki ke lawe aku imua o ka Poe Hoona Kuleana.

KAMEHAMEHA.

Hale Alii, Febr. 9, 1848.

A true translation of which is as follows :

"For Kinimaka.

The lands.	Ahupuaa.	Kalana.	Island.
Maihi	"	Kona	Hawaii.
Kalahiki	"	"	"
Onouli malo	"	Molokai.
½ Keana	"	Koolau Loa	Oahu.

I hereby assent to this division. It is good.

To Kinimaka are the lands above written.

It is hereby allowed to take them before the Board of Commissioners.

KAMEHAMEHA.

Palace, Febr. 9, 1848.

305

Statement of Claim and Evidence.

Helu 129, Kinimaka.

WAHI E NOHO AI,
HONOLULU, Iulai 14, 1846.

Aloha oukou ka poe Hoona Kuleana mea Aina.

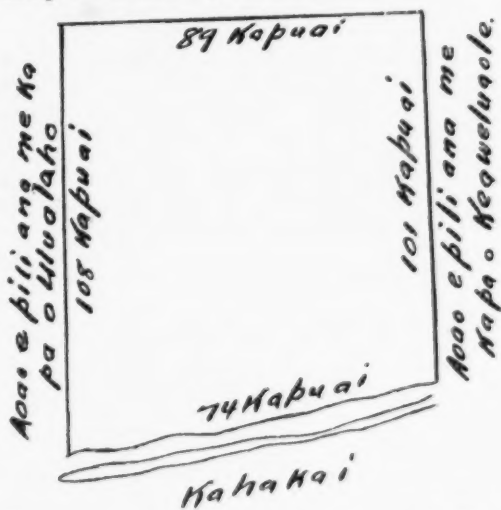
Eia mai ko'u mau pahale ma Honolulu nei, a me ko lakou mau kuleana e maopopo ai no'u keia mau pa. Aloha oukou.

Owau no me ka Kahalo ko oukou kauwa hoolohe,

KINIMAKA.

Kii 1.

Aoao mauka pili ana me ka pa o Wahinealii.

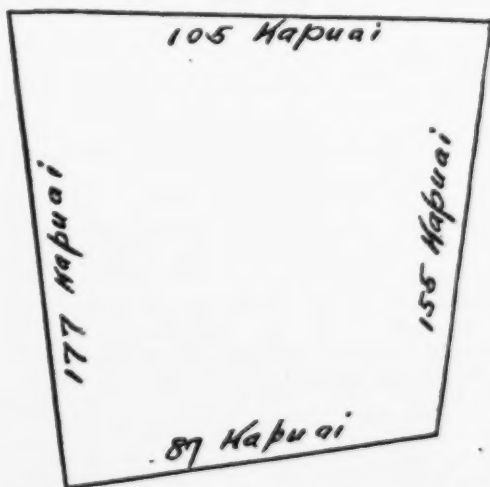


Eia ke kuleana o keia wahi, mai a Leleahano, a ia Hewahewa, a ia Kapiiwi, a ia Kinimaka.

KINIMAKA.

306

Kii 2.

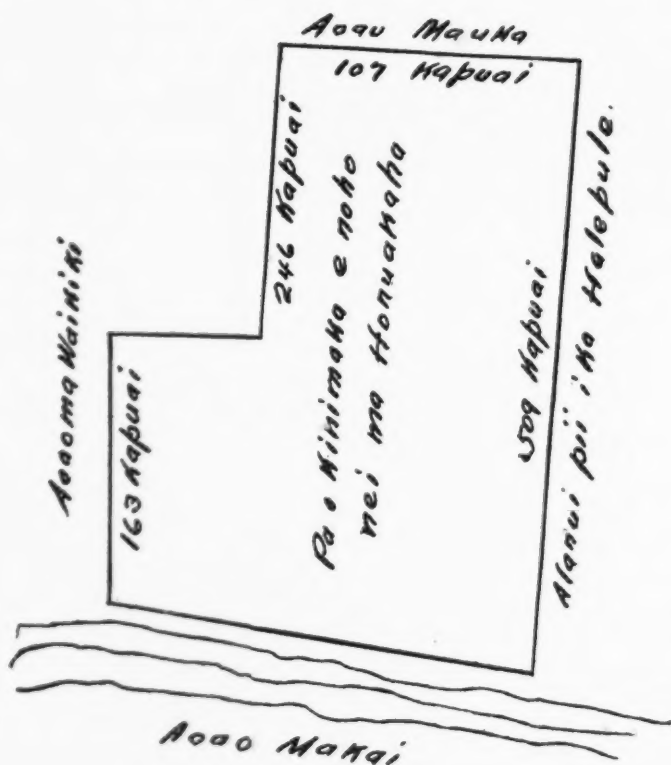


Eia ke kuleana o keia wahi mai a Kauikeaouli a ia Kaniu, mai Kaniu a ia Kinimaka.

KINIMAKA.

307

Kii 3.



Eia ke kuleana o ko'u pa, no Liliha mai ko'u o Kahikona ka hoike.

KINIMAKA.

of which a true translation is as follows:

RESIDENCE,
HONOLULU, July 14, 1846.

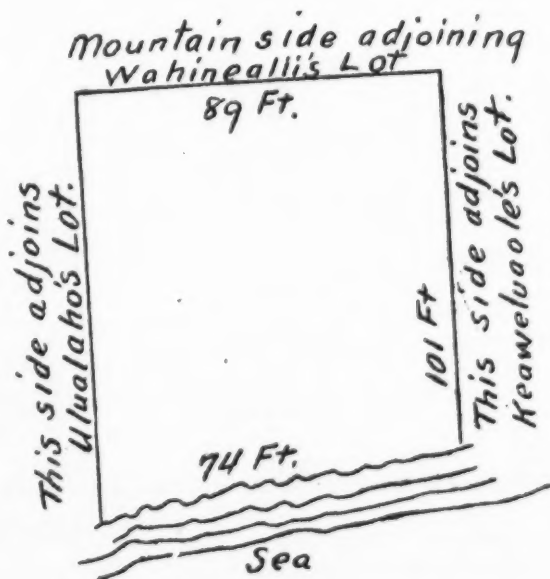
Greeting to the Board for Quieting Land Titles.

These are my house lots at Honolulu and rights therein that it may be clear that these lots are mine.

Love to you, I am with a blessing, Your obedient servant,

KINIMAKA.

Diagram 1.

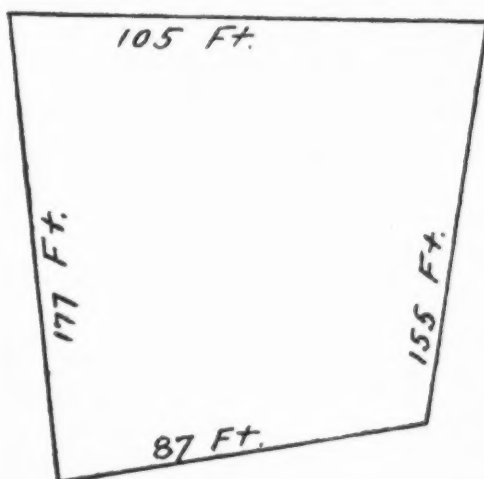


This is the right of property in this place. It is from Loleahen to Hewahewa and to Kapiiwi and to Kinimaka.

KINIMAKA.

309

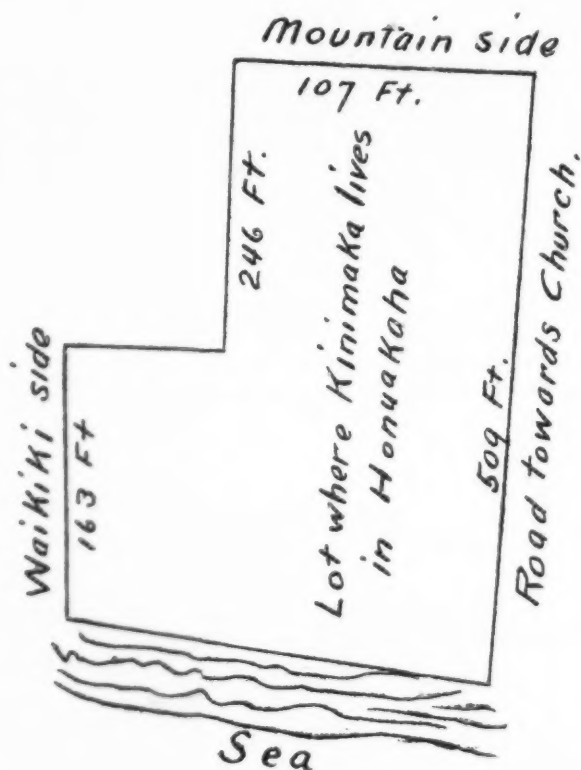
Diagram 2.



This is the right of property in this place. It is from Kanikea-rouli to Kaniu and from Kaniu to Kinimaka.

KINIMAKA.

Diagram 3.



This is the right of property in this lot. It is mine from Liliu
Kahikona is the witness.

KINIMAKA.

Endorsed: Circuit Court, 1st Circuit. In Equity. Kapiolani E
Ltd., vs. Mary H. Atcherley. Amended Bill for Injunction. Fil
April 16, 1902. A. G. Kaulukou, Clerk.

311

APPENDIX F.

In the Supreme Court of the Territory of Hawaii, October Term,
1902.

KAPIOLANI ESTATE, LTD.,

v.

MARY H. ATCHERLEY.

Appeal from Circuit Judge, First Circuit.

Submitted October 9, 1902; Decided April 7, 1903.

Frear, C. J., Galbraith and Perry, JJ.

If a decree is not clear or is ambiguous in its terms, it may be construed in the light of the averments and prayer of the bill and averments of the answer and of the remainder of the record.

A decree that A., "as guardian of K., D. and M.," minors, do convey to D. K. certain lands named, held, in the light of the pleadings and the remainder of the record, to be an order for the conveyance of the interests of the minors.

In a suit in equity brought to enforce a former decree of a court of equity, the respondent by demurrer questioned the validity and the correctness of the original decree. Held, that the attack thus made is collateral and not direct.

Upon collateral attack, mere errors or irregularities cannot be taken advantage of.

A decree rendered in 1858, requiring a guardian to execute a conveyance of land of his wards, minors, upheld, although it appeared that in the original suit the guardian as such, and not the minors, was named as the party defendant and that service of summons was made on the guardian as such and not on the minors themselves.

While upon a bill to carry a decree into execution the court may re-examine the propriety of the original decree, still it is not bound to do so in all cases. Where no fraud is alleged in obtaining the original decree,—declaring a trust and ordering a conveyance to the cestui que trust—and that decree is not incomplete, was adversary and not by consent, was rendered more than forty years prior to the request for re-examination and was followed during the whole of that period by sole and undisputed possession of the land by the complainant and his successors in interest, the decree should not be opened up.

312 *Opinion of the Court by Perry, J. (Galbraith, J., Dissenting).*

This is a bill to enforce a decree in equity rendered by the Honorable E. H. Allen, Chief Justice of the Supreme Court of Law and Equity of the Hawaiian Islands, in Chambers, on November

2, 1856, by which decree it was ordered "That Mr. Armstrong as Guardian of Kaniu, David Leleo and Kinimaka, minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this cause, the land named Omulimalo on the Island of Molokai, and the first apana of land set forth in Royal Patent No. 1602 filed in this cause." The prayer is that the respondent be permanently enjoined from prosecuting an action at law instituted by her to recover possession of Apana 1 of R. P. 1602 L. C. A. 129, and from bringing any other proceedings for the same purpose, and that she be decreed to be the trustee of all the right, title and interest of Kaniu, David Leleo, and Moses Kapaakea Kinimaka in and to the land described for the benefit of the complainant and as such trustee be ordered to convey all such interest to the complainant. A demurrer to the bill, on the ground that no cause of action was stated, was sustained pro forma and the bill dismissed. From that order the complainant appeals.

The main question is whether the respondent is bound by the decree of 1858. The essential facts, stated in detail in the bill, are as follows:

On December 29, 1856, David Kalakaua filed a bill in equity in the court on this island then having jurisdiction in such matters, against one Kinimaka. In that bill he alleged, in substance, that he was born in 1836 that prior to 1844 he lived with one
314 Kaniu, a chiefess, as her adopted child according to the custom of the country; that Kaniu was seized of certain rights, hereditary and other, in certain named lands, about thirteen in number, situate within the Kingdom and including that of Onoulimaloo, Molokai, and the apanas, house-lots in Honolulu, described in L. C. A. 129; that Kaniu died in 1844, leaving her husband, Kinimaka, the respondent, but no issue; that on the day of her death Kaniu made an oral will, good according to the custom of the country, whereby she appointed the complainant her heir and left to him all her property; that during the session of the Board of Land Commissioners to Quiet Land Titles, Kinimaka procured to be awarded to himself four of the lands named, including the house lots in Honolulu. Certain other facts were also set forth by virtue of which Kalakaua claimed that Kinimaka held the legal title to the lands in trust for him and a decree was prayed for declaring such trust.

Upon the filing of that bill a summons in the ordinary form was issued and served upon Kinimaka. The latter, however, died on January 24, 1857, without having answered the bill. On March 16, 1857, under the title of the original suit, Kalakaua filed a suggestion of the death of Kinimaka and of his leaving "as heirs by will" his three minor children, Kaniu, D. Leleo and Moses Kapaakea, and prayed that the heirs be made parties to the bill, that a guardian ad litem be appointed for them and that a time be set for the further hearing of the cause.

March 6, 1858, Kalakaua filed a petition in probate for proof of Kaniu's oral will and for his appointment as administrator of her estate. At the petitioner's request a guardian ad litem was appointed to represent the three minors in that proceeding and cita-

tion was issued to Pai, widow of Kinimaka, and George E. Beckwith as administrator of the latter's estate and also as guardian ad litem of the minors. Further proceedings having been had, the probate court, on May 3, 1858, gave judgment to the effect that the verbal will was duly proven and that letters testamentary thereon be issued to Kalakaua.

Upon petition of Pai, filed April 24, 1858, Richard Armstrong was appointed administrator of the estate of Kinimaka in place of G. E. Beckwith, resigned, and guardian of the persons and property of Kaniu, David Leleo and Kinimaka, the minors.

On July 19, 1856, a bill in equity was filed by Kalakaua averring substantially the same facts as were set forth in the bill of December 1856, adding however, an averment of the probate of the will of Kaniu, and praying for similar relief; but of the lands described in the earlier bill a part only, to wit, two house lots awarded by L. C. A. 129, R. P. 1602, and the ahupuaa of Onoulimaloo, L. C. A. 7130, was made the subject of the later one and a taro patch at Kaaleo, Oahu, L. C. A. 7130, not referred to in the first bill was included in the second. The concluding portion of the bill of 1858 reads: "And your orator would further represent, that the said Kinimaka, at the time of his decease, left a widow, by name Pai, and minor children by name Kaniu, David Leleo and Kinimaka, who by law succeed to the rights of the said Kinimaka, for which said children R. B. Armstrong, D. D., has been appointed guardian. And your orator, respectfully representing that he can have no remedy in the premises, except in a court of equity, humbly prays that the said Pai and the guardian of the said children, may be summoned to show cause, at such time and place as may be most convenient for your Honorable Court why it should not be decreed that the lands, hereinbefore mentioned, of right belong to your orator. And your orator further prays that it may be decreed that the said Kinimaka did, during his lifetime, procure the award, and held possession of the before mentioned lands, for the use and benefit of your orator, and further that the said R. B. Armstrong, guardian of the said minor children of the said Kinimaka may be ordered to convey to your orator all the right, title and interest of the said children in the aforesaid lands; and further that the aforesaid Pai, widow as aforesaid of the said Kinimaka, deceased, may be ordered to convey to your orator, all her right, title and interest in and to the above enumerated lands. And that such other orders and decrees may be made and passed in the premises, as may pertain to equity and good conscience and may give relief to your orator in the premises." The process issued required the Marshal to summon "Pai(w) and Richard Armstrong (Guardians of Kaniu, Leleo and Kinimaka, minors) defendants," to appear. etc.

To the bill of 1858 an answer was filed entitled "The Joint and Several Answers of Pai and Richard Armstrong, Guardians of Kaniu, David Leleo and Kinimaka, minors, Defendants, to the Bill of Complaint of David Kalakaua" and signed "Pai, Richard Armstrong, Guardian of Kaniu, David Leleo, Kinimaka, minors

By Asher B. Bates, their Solicitor." But very little was admitted in this answer. Ignorance was expressed as to the truth of the main averments and the complainant was left to his proof of the same. It was, however, stated by the respondents as their belief that if the awards were wrongfully issued to Kinimaka, they were issued upon testimony produced to the Board of Commissioners to quiet land titles which satisfied that Board that Kinimaka was entitled to such awards.

At the trial, counsel for the respondents presented the view that, assuming that the land originally belonged to Kaniu, and that she attempted to pass it by will to Kalakaua, nevertheless the King, cognizant of these facts, took back at the time of the great division his title to the land and thereafter, through the Board of Land

Commissioners, made a re-distribution and gave an award
317 covering these lands to Kinimaka and none to David, and that, no appeal having been taken from the award, the latter was final and the complainant was estopped from re-examining the matter. Decision was reserved by the court. Thereafter, on November 2, 1858, the complainant filed a discontinuance of his suit except in so far as the same related to the land of Onoulimaloo, Molokai, and Apana 1 of R. P. 1602, and on the same day the final decree now sought to be enforced was made.

Kinimaka by will left his property to Kaniu for life, after him to David Leleo for life and after him the remainder in fee to Moses Kapaakea who was sometimes called Kinimaka in the proceedings under review. David Leleo died before Kaniu and Moses Kapaakea survived the two others. The defendant now holds, by purchase from Moses Kapaakea, whatever title the elder Kinimaka had to the land. The complainant is likewise the successor to all of the rights of D. Kalakaua in the property. Richard Armstrong is now dead.

A question of lesser importance in the case may be disposed of first, and that is, concerning the construction of the decree. It is contended that the decree does not require a conveyance of the interest of the minors in the land or the giving of a deed in their name by the guardian. If the decree is not clear or is ambiguous in its terms, it may be read in the light of the averments and prayer of the bill and averments of the answer and of the remainder of the record. See *Clay v. Hildebrand*, 34 Kan. 694 (9 Pac. 466) *Finnagan v. Manchester* 12 Ia. 521, 2; 5 Encyl. Pl. & Pr. 1064; *Freeman on Judgts.* §45; 1 *Black on Judgts.* §123. So read, there can be no doubt, it seems to us, that it was the intention of the court to order the conveyance of the interests of the minors. In our opinion that intention is sufficiently expressed in the decree.

318 The main contention in support of the demurrer is that the minors were not bound by the decree of 1858, because they were not themselves named as parties defendant in the suit.

In *Meek v. Aswan*, 7 Haw. 750, it was held that an action to recover rent due for use of a minor's land should be brought in the name of the minor by her guardian and not in the name of the guardian as such. The court said, *inter alia*: "In the case at bar,

a guardian for the minor had been appointed by the Probate Court. How, then, should the suit be brought? The purpose of it was to collect rent due for use of the minor's land. It was the suit of the minor, and not that of the guardian. But the minor cannot make a contract with an attorney to bring a suit, and cannot personally bring a suit; therefore, he must act through some one, or by some one especially appointed by the court. The suit is nevertheless that of the minor.

"Analogous to this is a suit where the suitor is represented by an attorney in fact. The principal brings the action by the attorney in fact." It may be that this is the better rule, that it should apply as well to actions against minors, that the weight of modern authority elsewhere is in support of this view and that such is the practice at the present day in this Territory. But, however that may be, we think that if, as contended for by the complainant, the contrary practice prevailed in our courts prior to the decision in the Aswan case, and the proceedings in *Kalakaua v. Armstrong, Guardian*, and *Pai* were in accordance with that practice, the decree sought to be enforced should be held good and binding as against the minors.

In *Meek v. Aswan*, the court recognized the prior existence of a different practice. It said: "We are aware that a different practice has in many instances been followed in this court without objection, and suits have been instituted in the form of A. B., guardian of C. D." At the time of that decision (2889), the five members of the Supreme Court sat singly at nisi prius, exercising the jurisdiction and powers now vested in our Circuit Judges, and were therefore in a position to know what the practice in such matters was; and in this connection the ruling of Mr. Justice McCully, of the Supreme Court, who presided at the trial before the jury, is of great significance. The case had been instituted in the District Court of Honolulu where judgment had been rendered for the plaintiff. On appeal, after the jury had been empanelled and sworn and the plaintiff had opened the case, the defendant's counsel moved to dismiss on the ground that the action had been improperly brought in the name of the minor by her guardian and should have been brought by "G. S. Houghtailing, guardian of Eliza Meek." So thoroughly imbued with the past practice was the presiding justice, who afterwards joined in the decision sustaining the exceptions, that he held the declaration defective in respect to the party plaintiff and granted the motion to dismiss. It is interesting to note, in passing, that in the *Aswan* case the court said that the objection to the complaint, even if tenable, should not have been visited with a dismissal, but that an amendment should have been allowed,—in other words, that the error, if any, was at most a mere irregularity and not one affecting the validity of the proceeding.

Formerly, by the common law of Hawaii, guardians possessed and exercised the absolute right to dispose of the real and personal estate of their wards, as might suit their own will. See preamble to Act of August 4, 1851 (Laws of 1851, p. 63); *Laanui v. Puohu et al.*

2 Haw. 161, 162; Thornton v. Bishop, 7 Haw. 431, 434, 435; Hoare v. Allen 13 Haw. 257, 261. It is not to be wondered at that the view as to the title of a guardian in the land of his ward and as to 320 his powers generally growing out of those conditions, had not changed to any great extent during the few years next succeeding the enactment of the law of 1851 which abridged the rights and powers of guardians.

An examination of the records in some old cases referred to at the argument bears out the statement made in the Aswan decision as to the earlier practice.

In Law Case #627, 1856 and 1857, an action of ejectment, Kalama the plaintiff, alleged in her declaration that Kekuanaoa and Ii "have wrongfully entered upon" certain land described "—as your petitioner understands claiming to hold the same on behalf of H. R. H. Victoria Kamamalu—but whether this last averment be true or not complainant does not of herself know." There was no other allegation in the least tending to establish a case against Victoria Kamamalu or from which the inference might be drawn that the two men were being sued as guardians of Victoria. The two answered, and Victoria filed a motion, which was granted. "that the cause may be discharged as against her, as the petitioner alleges no cause of action against her to which she can plead." Concerning this motion the clerk in his minutes says that "Mr. Bates moved that Victoria's name be stricken out as it was not pretended that she had any control over it, but merely her guardians for her benefit." This is the first reference to the two defendants as guardians but from the remainder of the record it is apparent that it was regarded both by court and counsel that the defendants were being sued as guardians and in the title of the court's decision and of the appeal they are named as guardians. By stipulation of the parties, the court tried and determined the question of right and title to the land, that of damages to be submitted later, if necessary, to a jury or to referees, it being, however, the ward's right and title, and not that of the two men who were guardians, that was involved.

321 Ikalua (k), Guardian of Kanakaokai Aikaula(k) v. Kopaea and others, 1879, (Law #1463), Neil Campbell, Guardian of the persons and property of Kana (k), Ana (w) and Kamaka (k) minors, and Emilia (w) and Neil Campbell, her husband, v. Manu et al., 1881, (Law #1277) Naweli, Guardian of four minors named, v. Mary A. Auld and husband, 1881, (Law #1805) and A. F. Judd and S. B. Dole, Guardians of Airene H. Ii, a minor v. Kuanalewa et al., 1881-1882, (Law #2032) were all actions of ejectment in which the title of the wards was tried and determined. In each case the guardian as such was named as the plaintiff, and not the ward by the guardian. So, too, in Equity case #568, tried in 1886 and 1887, the bill and all subsequent papers, including two decisions by Mr. Justice Preston, were entitled "Yim Quon v. A. J. Cartwright, Guardian of George Holt and Annie Holt, defendant."

These cases, while but few in number, are sufficient to show a practice different from that declared in the Aswan case to be the

correct one, and counsel for the respondent, diligent and thorough as he has been in this case, has referred to but one to the contrary. That is the case of *Metcalf v. Metcalf*, Equity #251, (1859) in which the bill, without title, prayed that Emma Metcalf, a minor, be ordered to convey to the complainant certain premises alleged to be held by her in trust for him. The clerk's minutes and the bill of costs are each entitled "*Theophilus Metcalf v. Emma Metcalf*" and the decree of the court, as noted by the clerk, was that "the said Emma Metcalf, minor defendant, do release and convey * * * through her guardian *ad litem* J. W. Austin, Esq." On the other hand it may be noted that the complainant also prayed that "a guardian *ad litem* may be appointed by this Honorable Court who may be cited to appear and answer for the said Emma Metcalf and show cause if any there be why the prayer of this petition shall not be granted," that the order to the Marshal was to summon "J. W. Austin, Guardian *ad litem* for Emma Metcalf, defendant," that service was made as directed on the guardian, and that the respondent's answer was entitled "*Theophilus Metcalf v. J. W. Austin, Guardian ad litem of Emma Metcalf*" and signed by "J. W. Austin, Guardian *ad litem* of Emma Metcalf."

It is true that in none of the cases cited by the present complainant does it appear that the question was specifically raised. Yet from the very silence of court and counsel can be implied acquiescence in that mode of procedure and approval of it. "Where a court has erroneously held that certain things were sufficient to give jurisdiction and titles have been built thereon, the doctrine of *stare decisis* forbids the overruling of those decisions." Van Fleet, Coll. Attack, p. 1. Decrees rendered during the period in question extending from forty-five or more years ago to fifteen years ago, settling the titles to real estate and made in conformity with a procedure then regarded as good and impliedly decided to give jurisdiction to the court and to bind the wards, should now be upheld, irrespective of any later change in procedure and even though the lawyers and judges of today think differently as to the correctness of the former practice.

If the defects complained of can be regarded, not as matters affecting the jurisdiction but as constituting at most mere error, certainly such error cannot be taken advantage of in this case because the attack now made on the decree of 1858 is collateral and not direct. A collateral attack is an attempt to impeach a judgment or decree in a proceeding not instituted for the express purpose of annulling, correcting or modifying such judgment or decree." 17 Am. & Eng.

Ency. Law, 2nd ed., 848. See also *Morrill v. Morrill*, 20 Or. 96, 101; *Nichols v. Smith*, 26 N. H. 298, 300. "The word 'collateral'" in this connection, "is always used as the antithesis of 'direct,' and it is therefore wide enough to embrace any independent proceeding. To constitute a direct attack upon a judgment, it is said, it is necessary that a proceeding be instituted for that very purpose. If an appeal is taken from a judgment, or a writ of error, or if a motion is made to vacate or set it aside on account of some alleged irregularity, the attack is obviously direct, the sole object of the proceeding being to deny and disprove

the apparent validity of the judgment. But if the action or proceeding has an independent purpose and contemplates some other relief or result, although the overturning of the judgment may be important or even necessary to its success, then the attack upon the judgment is collateral and falls within the rule." 1 Black on Judgments, Sec. 252. "A direct attack on a judicial proceeding is an attempt to avoid or correct it in some manner provided by law. * * * A collateral attack on a judicial proceeding is an attempt to avoid defeat, or evade it, or to deny its force and effect in some manner not provided by law." Van Fleet, Collateral Attack, pp. 4, 5. Under either of these definitions,—we have not found any essentially different—the present attack is collateral. The complainant's bill has for its sole object the enforcement of the decree and necessarily proceeds on the assumption that that decree is not made in any manner provided by law nor in a proceeding instituted expressly for that purpose. "An attack on a judgment in a proceeding to revive it is a collateral attack."—Sharon v. Terry, 36 Fed. 337, 346. See also 1 Black on Judgments, Sec. 252.

Service of summons in the case of Kalakaua v. Armstrong was made on the guardian and not on the minors themselves. The same procedure was followed in Metcalf v. Metcalf and in Yim Quon v.

324 Cartwright, and is not unsupported by precedents elsewhere or in reason. The minors in this case were, in 1858, about eleven, seven and one year old respectively. Service on them would be, in reality, a worthless form. After service it is the guardian who acts and who conducts the whole defense; the ward does nothing and can do nothing. True, in theory, such service would serve to notify their parents or others standing in *loco parentis* of the institution of the suit. That purpose was in fact accomplished in this case for their mother, Pae, was herself a defendant and the guardian appointed at her request was also served. General guardians are by our statute, Section 1970, C. L., authorized and required to "appear for and represent" the ward "in all legal suits and proceedings, unless another person is appointed for that purpose, as guardian or next friend." A guardian might, perhaps, under this provision, waive service upon a minor defendant and enter an appearance and thereby bind the minor. That there is a difference of authorities as to whether a judgment against a minor without service on him is absolutely void for want of jurisdiction or is merely voidable and so immune from collateral attack, is conceded by respondent. The point as to lack of service is relied upon by her only to the extent of showing that for that reason the decree was erroneous and should not be now enforced.

The old decree is claimed by respondent to be erroneous for the further reason that upon the facts and the evidence adduced in that proceeding in 1858, the court erred in holding that Kinimaka, and after him his heirs, was a trustee of the legal title for the benefit of Kalakaua. The contention of the respondent is that because of these two alleged errors last mentioned, to wit, the lack of service and upon the merits, the court should refuse to enforce the decree. It is not contended that the court must in all such cases re-examine the former

proceedings but merely that it may, in its discretion, do so. Assuming that to be so, we decline to re-try the old case.

The guardian appeared and contested the complainant's claim, presenting in opposition substantially the same views now sought to be urged by the respondent. The ward's interests were not permitted to go by default but were fully defended by counsel. The decree, while not carried out by the execution of a conveyance, was in fact acquiesced in, as appears by the bill, by all concerned and complainant and his successors in interest from that time continuously until about January, 1900, held open, notorious and undisturbed possession of the land. Under the circumstances, and after a lapse of more than forty years, we do not think that the court should examine into the merits of the former proceedings or refuse to enforce the decree for the reasons suggested.

As to whether the bill of 1858 was a continuation, by revival, of the proceedings instituted in 1856, or was the commencement of a new and independent suit, we express no opinion.

The decree appealed from is reversed and the cause remanded to the Circuit Judge for such further proceedings as may be proper.

(Sig.)

A. PERRY.

Kinney, Ballou and McClanahan and H. A. Bigelow for the complainant.

L. A. Dickey for the respondent.

Concurring Opinion of Frear, C. J.

I concur in general in the reasoning and conclusions of the foregoing opinion.

It is true, as held in *Lawrence Mfg. Co. v. Janesville Mills*, 138 U. S. 552, that "where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill," but that does not mean that the former decree should be opened up in all cases. As a rule it is not opened up where, as here, so long a time has elapsed since it was made and where no fraud is alleged in obtaining it and where it is not incomplete and where it was adversary and not by consent. The case just cited from the Federal Supreme Court was brought to piece out a decree that was both incomplete and by consent. As the court said: "The prior decree was the consequence of the consent and not of the judgment of the court, and this being so, the court had the right to decline to treat it as *res adjudicata*." And in *Buchanan v. Knoxville & O. R. Co.*, 71 Fed. Rep. 324, the United States Circuit Court of Appeals for the Sixth Circuit distinguished that case, and, after pointing out that it was a case to piece out an incomplete consent decree and quoting from it the language first above quoted herein, said: "That is a very different case from that of a party who stands on a complete decree, and seeks no other benefit or advantage than that which is due by the general law from a former judgment." In the present case it would be practically impossible, owing to lapse of

time and the deaths of witnesses, to go into the merits of the former decree, and the plaintiff and its predecessors have been in possession and enjoyed the benefits of that decree without question for more than forty years.

The question whether the guardian or the minors should have been made parties and served in the former case can hardly be said to be involved. We may assume not only, as was perhaps held by implication in *Meek v. Aswan*, 7 Haw. 750, that it would have been correct practice to have made the minors defendants and to have served them, but also that it was incorrect practice to make the guardian the party defendant and serve him alone. Still, if that is only a question of error, and not of jurisdiction, it cannot be raised on a collateral attack. There can be no doubt that

327 this attack is collateral. The only question, therefore, is whether the court in the former case merely committed error or was entirely without jurisdiction, whether the decree was absolutely void or merely voidable on direct attack. The *Meek* case was one of direct attack and the court seemed to intimate that the irregularity complained of, if well founded, was one of error rather than of jurisdiction. In *McAnear v. Epperson*, 54 Tex., 220, in which a judgment was attacked collaterally on the ground that it was void because no service had been made on the minor defendants, the court said: "After a careful and extended examination of many cases in addition to those cited by counsel, in which the judgments in adversary proceedings, like the one now under consideration, were sought to be set aside because the minor defendants, although represented by guardians *ad litem*, had not been personally cited, we indorse this remark of Judge Hitchcock's in *Robb v. Irwin*: 'Much is said in the books upon the subject. But I apprehend it will be found upon examination that decrees entered under such circumstances are generally, if not universally, holden to be voidable, not void.' 15 Ohio, 699; *Preston v. Dunn*, 25 Ala., 507; *Nelson v. Moon*, 3 McLean's C. C., 319; *Day v. Kerr*, 7 Mo., 426; *Sheldon v. Newton*, 3 Ohio St., 504. * * * We are of opinion, upon the weight of authority, that a failure to cite the minor defendants personally in suit No. 2103, they having been defended by a guardian *ad litem*, however sufficiently erroneous to have caused a reversal of the judgment against them on direct proceedings, was not such fatal defect as would render the judgment absolutely void, so that it can be successfully impeached on a collateral attack." In *Dampier v. McCall*, 78 Ga. 687 (3 S. E. 563), the court went so far as to decline to interfere even on direct attack where service had been made on the guardian alone.

328 See also as bearing on this general question, *Smith v. McDonauld*, 42 Cal. 484; *Tessee v. Lowe*, 18 Oh. 368; *McFarland v. Febiger's Heirs*, 7 Oh. 198; *White v. Albertson*, 14 N. C. 241; *Gotendorf v. Goldschmidt*, 83 N. Y. 112; *Doe v. Litherberry*, 4 McClean 442; *Ankeny v. Blackiston*, 7 Or. 407; *Jongsma v. Pfiel*, 9 Ves. 357; 1 Dan. Ch. Pl. & Pr. 444, note 6. It is true these cases relate to the question of service of process rather than to that of parties of record, but the former would seem to be the more im-

important of the two questions. If the principle contended for is correct, it would seem quite as important that the minor should be personally served as that the defendant should be "A, minor, by B, guardian" instead of "B, guardian, for A, minor." No instance has been cited in which a decree made under either of these circumstances has been held void on collateral attack. The question is not whether Meek v. Aswan shall be followed or whether the matter is *stare decisis* in view of the former practice. To hold that the question is one of error rather than of jurisdiction, and so that the decree is not subject to collateral attack, is in entire harmony with the decision in Meek v. Aswan; and former practice, as regarded a number of the cases above cited, greatly emphasizes the propriety of upholding former decrees as far as possible under circumstances like the present.

(Sig.)

W. F. FREAR.

Dissenting Opinion of Galbraith, J.

I do not concur in the argument or conclusion announced in the foregoing opinion.

The rule recognized by the Supreme Court of the United States, and absolutely binding on the Courts of this Territory, is that "where a party returns to a court of chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill." *Lawrence Mfg. Company v. Janesville Cotton Mill*, 138 U. S. 552, 561.

This rule clearly gave the trial court the power in hearing the bill to open up and re-examine the decree of 1858, and, it seems to me, that with the possession of the power there was an implied duty to exercise it. Aside from this consideration a decree that has been permitted to remain dormant for 44 years needs a "clear bill of health" to enable the doctrine of *stare decisis* to be invoked in its behalf and to authorize a court after so long a time to decree its specific performance.

This decree of 1858 did not divest the respondent's grantor of the legal title to the property in dispute, nor did it pretend to do so. It merely ordered Armstrong, as guardian, to convey the property. This he did not do. Why we do not know. The fact that complainant and its grantor remained passive so far as this decree was concerned for all these years while the legal title to the property was in another and took no step to force a conveyance of title under the decree is difficult to reconcile with the claim that they felt secure in the legality of the decree. I do not deem it necessary to go into the merits of this decree further than to state that there is sufficient on the face of the bill to raise a serious question in my mind as to its correctness.

I do not consider the claim well taken that the respondent and her predecessor in title "acquiesced" in this decree by the fact that no action was taken to have the same reversed or set aside. They were not compelled to take the initiative or to do anything, so

long as no attempt to execute the decree was made. The decree was harmless to them so long as no attempt was made to enforce it. The burden of action was on the complainant. The legal title was in the respondent's grantor and so long as nothing was done to compel him or them to convey, his, or their, inaction cannot be said to be "acquiescence" to her prejudice.

The doctrine of *stare decisis* has been invoked in behalf of the decree. It seems to me that this doctrine will prohibit the granting of the prayer of the bill. Blackstone says relative to this doctrine "for it is an established rule to abide by former precedents. When the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule which it is not in the breast of any subsequent judge to alter or vary from according to his private sentiments; he being sworn to determine not according to his own private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one." 1 Blackstone 69.

I understand that it is the "former precedents" of this Court not the uncertain precedents of the Circuit Court (which can only be ascertained by a tedious search of the files of that Court) that this Court should "abide by" and that it is in this way that we may "keep the scale of justice even and steady and not liable to waver with every new judge's opinion."

This court has decided in a suit by a minor to collect rent due that the action should be commenced in the name of the minor and its guardian. (Meek v. Aswan, 7 Haw. 750.) The converse of this proposition is that a suit against a minor should be against him by his guardian and not against his guardian alone. This is admitted so far as this case is concerned. "It may be that this is the better rule, that it should apply as well to actions against minors, that the weight of modern authorities, elsewhere in support of this view, and that such is the practice at the present day in this Territory." Notwithstanding this admission the decision in the Aswan case is not followed, nor is it overruled, in express terms, for the reason that a "contrary practice prevailed in our Courts prior to the decision in the Aswan case." This "contrary practice" may have been permissible prior to the decision in the Aswan case but the decision having declared the practice wrong we cannot now approve of such practice without overruling that case. That case ought not to be overruled for the reason that it is good law and is supported by the great current of judicial authority elsewhere.

Again what is the evidence of this contrary practice? No decisions were cited in this jurisdiction to support it. We are referred to the files of some seven & eight cases in the Circuit Court where the papers are entitled as were those in the case in which the decree in question was rendered. It is not contended that

the correctness of the procedure was raised in any of these cases or that the ruling of a Circuit Judge supported it, but it is contended that there was an "implied acquiescence" in the practice "from the very silence of the Court and counsel." So we have only the "implied acquiescence" of the Court and counsel in seven or eight cases in the Circuit Court extending over a period of thirty or forty years to support the majority of the Court in refusing to follow a decision of this Court rendered at the time when the Court was composed of five judges. This reasoning followed to its logical conclusion, it seems, would prevent this Court from overruling a practice or procedure of the Circuit Court no matter how erroneous provided "court and counsel" had by silence acquiesced in it in a few cases, extending over a number of years.

332 Again the practice of digging up the files of the Circuit

Court and referring to them to establish a practice or procedure does not appeal to me very strongly. There is enough difficulty in determining such questions when reference is to reported cases where the evidence of the question passed upon is supposed to be preserved in practicable form. To search through a lot of files of the trial court and examine the entitling of the papers and the endorsement on the summons is not in any way a satisfactory method to establish a question of procedure let alone to justify an appellate court in passing by one of its own solemn decisions.

The heirs of Kinimaka were the real parties in interest in the suit resulting in the decree of 1858 and sought to be enforced by the bill. These heirs were not made parties to that suit, were not served with process therein and made no appearance although their guardian was a party, was served and appeared and contested the cause still the heirs were not parties and were not bound by the decree nor is the respondent in this case and the decree ought not to be enforced without a re-trial of the cause.

The decree sustaining the demurrer to the bill should be affirmed, and the appeal dismissed.

(Sig.)

C. A. GALBRAITH.

Endorsed: 1246. Supreme Court. Territory of Hawaii. Kapio-lani Estate vs. Mary H. Atcherley. Decision. Filed April 7, 1903. (S.) George Lucas, Clerk.

333

No. 76.

LEWERS AND COOKE, LIMITED, Petitioner.

Certificate of Statement of Fact.

The above entitled cause after appeal from the Court of Land Registration having been remitted to the said Court by the Supreme Court of the Territory of Hawaii, with directions to set aside its former decree ordering that the title to the land in controversy be registered in the name of Lewers and Cooke, Limited, and to enter a decree denying the registration of such title, and the decree hav-

ing been entered by this court so denying registration, and the petitioner having noted an appeal to the Supreme Court of the Territory of Hawaii, from the said final decree denying registration, in accordance with the decision of the Supreme Court of the Territory of Hawaii, and said appeal from the second decree being necessary as a preliminary step to securing an appeal from the Supreme Court of the Territory to the Supreme Court of the United States, the Court of Land Registration has prepared a statement of the facts of the case for the use of the Supreme Court of the Territory of Hawaii conforming with the requirements of the act of April 7, 1874 (18 Statutes at Large, 27).

I hereby certify that the foregoing statement is a true statement of the facts of the case as they appear from the record.

Honolulu, Sept. 25, 1908.

(Sig.)

P. L. WEAVER,

Judge Court of Land Registration.

Endorsed: S. C. No. 308. No. 76. Petition of Lewers & Cooke Ltd. Statement on Appeal. Filed September 25, 1908, at 12:10 o'clock P. M. J. A. Thompson, clerk.

334 [Endorsed:] No. 308. Supreme Court, Territory of Hawaii, October Term, 1908. In the Matter of the Petition of Lewers & Cooke, Limited. Findings of Fact. Filed May 10, 1909 at — o'clock —. M. J. A. Thompson, clerk.

335 In the Supreme Court of the Territory of Hawaii, October Term, 1908.

No. 308.

In the Matter of the Petition of LEWERS AND COOKE, LIMITED, for a Registered Title To Land.

On Appeal to the Supreme Court of the United States.

Certificate of Clerk to Transcript of Record.

TERRITORY OF HAWAII,

City and County of Honolulu, ss:

I, James A. Thompson, Clerk of the Supreme Court of the Territory of Hawaii, do hereby certify that the foregoing pages numbered from 1 to 202 both inclusive, pages numbered from 206 to 213 both inclusive, are full true and correct copies of the papers, documents, entries and decrees as the same are on file and of record in my office as Clerk of the said Supreme Court of the Territory of Hawaii in the above entitled cause, the foregoing constituting a transcript of the proceedings and decrees, and instead of the evidence at large, the findings of facts of the case, being pages numbered from 216 to 33 of this transcript and herewith transmitted to the Supreme Court of

the United States on the appeal of Lewers and Cooke, Limited in the above entitled cause.

I do further certify that the Original Appeal of Lewers and Cooke, Limited, to the Supreme Court of the United States, together with and annexed thereto the Original Order allowing the appeal and Acknowledgment of service of appeal and of the Citation on Appeal, being pages numbered from 203 to 205, both inclusive, and the Original Citation on Appeal, being pages numbered from 214 to 215 both inclusive are hereto attached and herewith returned.

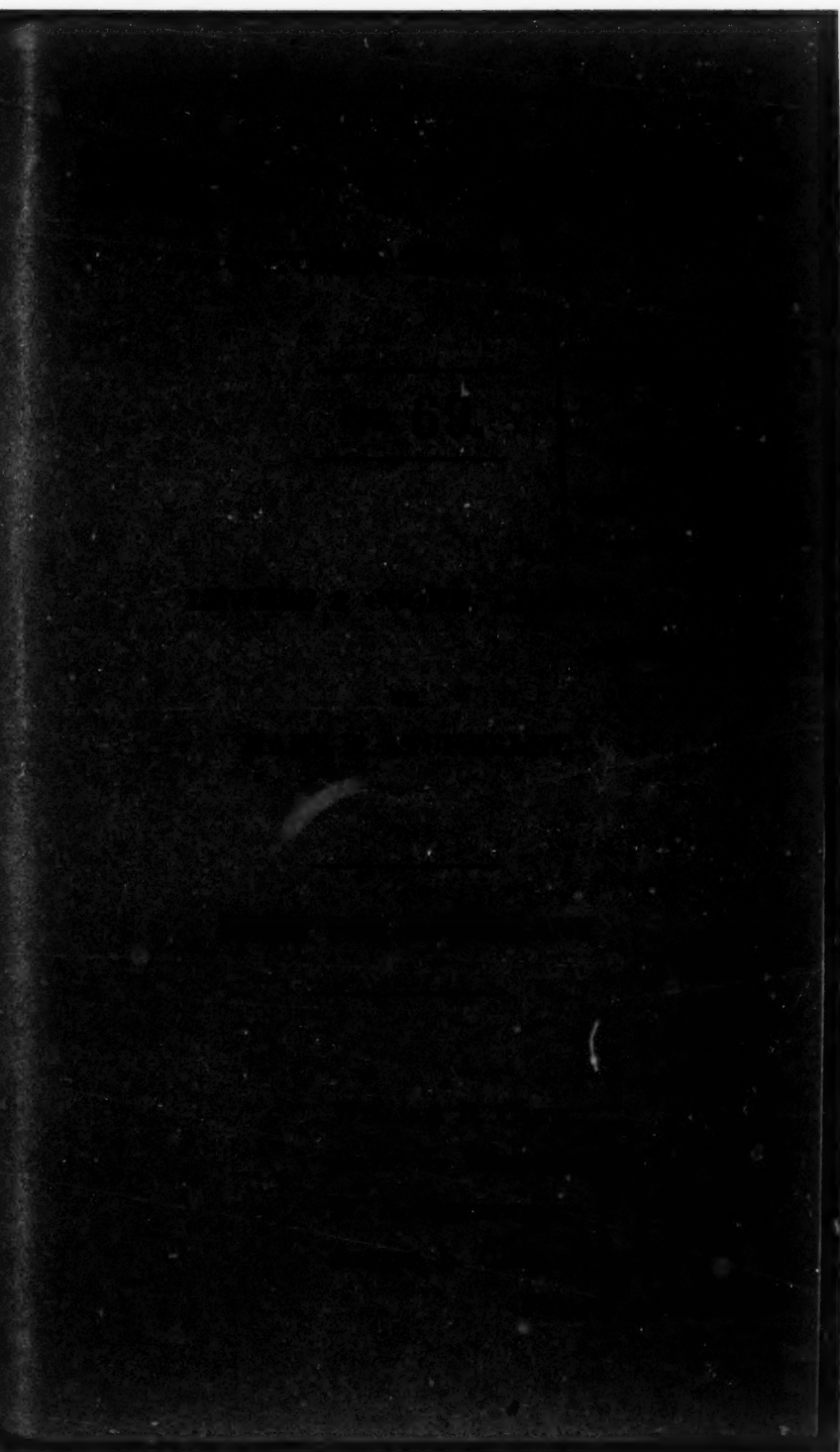
In witness whereof, I have hereunto set my hand and affixed the Seal of the Supreme Court of the Territory of Hawaii, this 29th day of May, A. D. 1909, at my Office in Honolulu, in the City and County of Honolulu.

[Seal Supreme Court, Territory of Hawaii.]

JAMES A. THOMPSON,
*Clerk of the Supreme Court of the
Territory of Hawaii.*

Endorsed on cover: File No. 21,723. Hawaii Territory Supreme Court. Term No. 247. Lewers & Cooke, Limited, appellant, vs. Mary H. Atcherly. Filed June 14th, 1909. File No. 21,723.







INDEX

	PAGE.
STATEMENT OF THE CASE.....	1
ERRORS ASSIGNED	11
ARGUMENT	14
I. <i>It was error to overrule the discretion of the Court of Land Registration in declining to reopen the decree of 1858.....</i>	14
If the decree of 1858 could be reopened, whether it could be reopened was in the discretion of the land court.....	14
This question of fact is not reviewable on appeal.....	15
No abuse of discretion on the part of the land court.....	16
In reaching this conclusion, the Supreme Court of Hawaii has ignored and overruled the findings of fact of the land court, which sustained the equity of appellant.....	16
II. <i>Lewers & Cooke, Limited, have a legal title to the land, since it will be presumed that a deed has been executed.....</i>	18
III. <i>The equitable title is in Lewers & Cooke, Limited.....</i>	18
Land tenures in Hawaii before the Mahele.....	18
The Great Mahele	19
Purposes and powers of the Board of Land Commissioners....	20
Rights of guardians	21
The effect of the award on existing instruments or agreements affecting title	22
Jurisdiction of the court.....	23
Effect of the judgment of the Probate Court.....	28
Equitable title of Kalakauna.....	29
The parties to the proceeding in 1858.....	30
Hawaiian cases cited by the court not in conflict with the holding of Chief Justice Allen.....	31
The decisions of this court sustain Chief Justice Allen's jurisdiction	33
IV. <i>The decree of Judge Robertson admitting the will of Kaniu to probate is a binding adjudication that Kalakaua was, after the death of Kaniu, beneficially entitled to the premises in question.....</i>	42
V. <i>The decree of November 2, 1858, is a conclusive adjudication between the parties, and is complete and final.....</i>	42
VI. <i>If the decree of 1858 was not adversary but by consent, yet as it is based on a valuable consideration, namely, the release of other lands, it cannot be upset today.....</i>	47
VII. <i>The decision in Kapiolani Estate, Limited, v. Atcherley is a binding and conclusive adjudication on Mary H. Atcherley..</i>	47
It is a decision of the highest court.....	47
Law of the case.....	49
Stare decisis	49

	PAGE.
VIII. <i>The decisions of Judge Robertson and Chief Justice Allen in 1858 and the decision of the Supreme Court in 1903 having laid down a rule of property, Lewers & Cooke, Limited, were entitled to rely upon it in making a purchase of the property, and the Hawaiian court cannot disregard its former opinion.</i>	50
IX. <i>The decisions of 1858 and 1903 necessarily construed the statutes defining the jurisdiction of the Land Court and of the Supreme Court in 1858 and held that that court had jurisdiction. These decisions became a part of the law, and a subsequent decision could not change the rights of the parties .</i>	52

APPENDIX

	PAGE.
Commissioners to Quiet Land Titles, Act Creating.....	57
Constitution of June 14, 1852.....	64
Guardians and Wards, Act Regulating.....	60
Judiciary Act of May 26, 1853.....	61
Judiciary Department of the Hawaiian Islands, Act to Organize.....	62
Revised Laws of Hawaii.....	57

CASES CITED

	PAGE.
Ainsa v. New Mexico & Ariz. R. Co., 175 U. S. 76.....	39
Akeau v. Iakona, 13 Haw. 216.....	28
Angle v. Chicago, etc., R. R. Co., 151 U. S. 1.....	35
Bagnell v. Broderick, 13 Pet. 436.....	27, 33
Barker v. Harvey, 181 U. S. 481.....	40
Beard v. Federy, 3 Wall. 478.....	27, 40
Bernier v. Bernier, 147 U. S. 242.....	36
Bibb v. Bibb, 79 Ala. 437.....	51
Bockfinger v. Foster, 190 U. S. 116.....	36
Bond v. Hopkins, 1 Sch. & Lef. 420.....	25
Boquillas Land & Cattle Co. v. Curtin, 213 U. S. 339.....	39
Botiller v. Dominguez, 130 U. S. 238.....	39
Bright v. Esterly, 199 Penn. 88.....	52
Brush v. Ware, 15 Pet. 93.....	26
California Powder Works v. Davis, 151 U. S. 389.....	40
Central Trust Co. v. Grant Locomotive Works, 135 U. S. 207.....	16
Dana v. Angel, 1 Haw. 347.....	25
Darling v. Westmoreland, 52 N. H. 401.....	15
Davis v. Braden, 10 Pet. 286.....	16
“ v. Brewer, 3 Haw. 270.....	27
“ v. Brewer, 3 Haw. 359.....	27
De Guyer v. Banning, 167 U. S. 723.....	40
Dunklin County v. Chouteau, 120 Mo. 577.....	51, 52
Early v. Rogers, 16 Haw. 599.....	16
Estate of Kaniu, 2 Haw. 82.....	5, 33
“ Kekauluohi, 6 Haw. 172.....	33
Estrada v. Murphy, 19 Cal. 248.....	37
Fauntleroy's Heirs v. Henderson, 51 Ky. 447.....	18
Felix v. Patrick, 145 U. S. 317.....	36
Fenn v. Holman, 21 How. 481.....	27
Field v. Seabury, 19 How. 322.....	27
Fisher v. Lott, 110 S. W. 822.....	55
Frank v. Evansville & I. R. Co., 111 Ind. 132.....	51
Gay v. Parpart, 106 U. S. 679.....	45
Green v. Liter, 8 Cr. 250.....	27
Grignon v. Astor, 2 How. 343.....	51

	PAGE.
Hackfeld v. Bal, 6 Haw. 364.....	28
Hadden v. Spader, 20 Johns. 562.....	25
Hall v. Wells, 54 Miss. 301.....	55
Hamilton v. Houghton, 2 Bligh 169.....	46
Haskett v. Maxey, 134 Ind. 182.....	55
Henderson v. Griffith, 5 Pet. 151.....	51
“ v. Rost, 11 La. Ann. 541.....	52
Herndon v. Moore, 18 S. C. 355.....	55
Herrick v. Boquillas L. & C. Co., 200 U. S. 96.....	40
Hihn v. Courtis, 31 Cal. 398.....	51
Houston & T. C. R. Co. v. Texas, 177 U. S. 66.....	52
Johnson v. Northey, Finch. Prec. in Ch. 134.....	46
“ v. Towsley, 13 Wall. 85.....	33
“ v. Waters, 111 U. S. 640.....	37
Jones v. Meek, 2 Haw. 9.....	23
Kani v. Mahuka, 5 Haw. 354.....	19, 33
Kaaihue v. Crabbe, 3 Haw. 768.....	23
Kalakaua v. Keakeamahi, 4 Haw. 571.....	33
“ v. “ 4 Haw. 577.....	22, 32
Kamehameha v. Kahookano, 2 Haw. 118.....	21
Kapea v. Moehonua, 6 Haw. 49.....	28
Kealoha v. Castle, 210 U. S. 148.....	51
Kelipelapela v. Pamano, 1 Haw. 503.....	29, 42
Kent's Commentaries	54
Kuala v. Kuapahi, 15 Haw. 300.....	44
Kuhn v. Fairmont Coal Co., 213 U. S. 372.....	51, 55, 56
Kukiahua v. Gill, 1 Haw. 90.....	31
Laanni v. Puohu, 2 Haw. 161.....	21, 23
Lawrence v. Berney, 2 Rep. in Ch. 127.....	47
“ Mfg. Co. v. Janesville Cotton Mills, 138 U. S. 552.....	8, 45
Levy v. Hitsche, 40 La. Ann. 508.....	55
Loeb v. Trustees Columbia Township, 179 U. S. 472.....	55
Lono v. Phillips, 5 Haw. 357.....	22
Los Angeles v. Los Angeles City Water Co., 177 U. S. 558.....	55
“ “ F. & M. Co. v. Los Angeles, 217 U. S. 226.....	39
Lynch v. De Bernal, 9 Wall. 315.....	41
McAllister v. Kuhn, 96 U. S. 87.....	16
McChesney v. Kona Sugar Co., 15 Haw. 710.....	44
McCulloch v. Maryland, 4 Wheat. 423.....	38
McPherson v. Grenliff, 11 Serg. & R. 429.....	38
Marbury v. Madison, 1 Cranch. 170.....	38
Massie v. Watts, 6 Cranch. 148.....	35
Meador v. Norton, 11 Wall. 442.....	36

	PAGE.
Mellen v. Moline Malleable Iron Works, 131 U. S. 352.....	44
Mills v. Briggs, 4 Haw. 506.....	28
Minn. Min. Co. v. National Min. Co., 3 Wall. 332.....	51
Minter v. Cromelin, 18 How. 87.....	27
Montgomery v. Coady, 2 Haw. 322.....	26
" v. Montgomery, 2 Haw. 553.....	26
Moore v. Crawford, 130 U. S. 122.....	35
More v. Steinbach, 127 U. S. 70.....	40, 41
Muhler v. New York & H. R. Co., 197 U. S. 544.....	55
Myers v. Boyd, 144 Ind. 449.....	55
 New Orleans v. Fisher, 180 U. S. 185.....	45
Norris v. Herblay, 9 Haw. 514.....	28
 Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416.....	55
O'Rourke v. Clopper, 22 Tex. Civ. App. 377.....	52
 Patch v. Ward, 3 Eng. Ch. App. 206.....	27
Patterson v. Winn, 11 Wheat. 380.....	33
People v. Livingston, 8 Barb. 253.....	27
Perkins v. Fairfield, 11 Mass. 227.....	38
Perry v. Lucas, 11 Haw. 350.....	28
Propeller Genesee Chief, The v. Fitzhugh, 12 How. 451.....	51
Providence Bank v. Billings, 4 Pet. 563.....	38
 Ringo v. Binns, 10 Pet. 269.....	34
Rio Grande Irrigation & C. Co. v. Gildersleeve, 174 U. S. 602.....	16
Rodgers v. Bradshaw, 20 Johns. 739.....	38
Rowan v. Reynolds, 5 How. 134.....	54
Russell v. Maxwell Land Grant Co., 158 U. S. 253.....	40
 Sanford v. Sanford, 139 U. S. 642.....	38
Satterlee v. Matthewson, 2 Pet. 412.....	38
Schori v. Stephens, 62 Ind. 441.....	51
See Hop v. Parke, 6 Haw. 688.....	28
Shand v. Henderson, 2 Dow. P. C. 521.....	38
Slicer v. Bank of Pittsburg, 16 How. 571.....	16
Stark v. Starr, 6 Wall. 419.....	33
State v. Comptoir Nat. D'Escompte De Paris, 51 La. Ann. 1272.....	53
Stephenson v. Boddy, 139 Ind. 66.....	55
Stoddard v. Chambers, 2 How. 318.....	27
Stringer v. Young's Lessee, 3 Pet. 344.....	27
Sutherland's Stat. Construction	54
 The Propeller Genesee Chief v. Fitzhugh, 12 How. 451.....	51
Thompson v. Los Angeles F. & M. Co., 180 U. S. 72.....	40
Thompson v. Tolmie, 2 Pet. 167.....	38
Thurston v. Bishop, 7 Haw. 421.....	20, 21
Townsend v. Greely, 5 Wall. 326.....	37

	PAGE.
Union Ry. Co. v. Chickasaw C. Co., 116 Tenn. 598.....	52
United States v. Arredondo, 6 Pet. 691.....	38
United States v. Cal. & Ore. L. Co., 148 U. S. 43.....	38, 40
United States v. Estudillo, 1 Wall. 710.....	16
United States v. Morse, 218 U. S. 493.....	44
 Vail v. Arizona, 207 U. S. 201.....	 49
Wadhams v. Gay, 73 Ill. 415.....	45, 46
Wei See v. Young Sheong, 3 Haw. 489.....	28
White v. Cannon, 6 Wall. 443.....	35
White v. Kyle, 1 Serg. & R. 15.....	51
Widdicombe v. Childers, 124 U. S. 400.....	37
Wilkins v. Chicago, etc., Ry. Co., 110 Tenn. 442.....	52

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1911

No.

LEWERS & COOKE, LIMITED, APPELLANT,

vs.

MARY H. ATCHERLEY.

BRIEF FOR APPELLANT

STATEMENT OF THE CASE.

Appeal from a decree of the Supreme Court of Hawaii entered March 24, 1909, modifying a decree of the Court of Land Registration, and finding that the petitioner, Lewers & Cooke, Limited, has no legal or equitable title to Lot 1 of Land Commission Award 129, Royal Patent 1602 issued to Kinimaka, and denying its petition for registration without prejudice to its right to apply for a registration for another piece of land (Tr. p. 118).

The decree of the Court of Land Registration (Tr. p. 47) was entered pursuant to a previous decision

of the Supreme Court of Hawaii rendered upon appeal of the respondent, Mary H. Atcherley, from a decree registering the title to the lot (Tr. p. 11) upon a written decision of the Land Court (Tr. p. 60). The appeal to the Supreme Court of Hawaii is "solely upon points of law." (Rev. Laws, Sec. 2407, amended April 5, 1907.)

The opinion on the original appeal, rendered March 5, 1908 (Tr. p. 15), is found in 18 Haw. 625; the petition for rehearing, May 4, 1908 (Tr. p. 43), in 19 Haw. 47.

The case had previously been before the Supreme Court on an appeal by the Kapiolani Home (18 Haw. 497).

There is in the record a statement of facts by the Court of Land Registration (Tr. p. 50) and by the Supreme Court of Hawaii (Tr. p. 125). The same facts are also set out in the amended bill of the Kapiolani Estate, Limited, v. Mary H. Atcherley as are included in each of the foregoing statements (Tr. pp. 84 and 160), excepting the fact that Lewers & Cooke, Limited, acquired title relying on this decision.

In the controversy there has been no disputed fact (although some are misstated, in the opinion of the Supreme Court). The facts are: Kaniu, a high chiefess, the King's nurse, who had been the wife of Governor Adams, married one Kinimaka—not of her rank (Tr. p. 145). She adopted, after the Hawaiian fashion, a relative—perhaps grandnephew—David Kalakaua, who became King Kalakaua (Tr. pp. 127,

145), whose own father, Kapaakea, thereafter claimed no authority over him, and who lived on the property with Kaniu until her death in 1843 (Tr. pp. 127, 129, 145, 157). Kaniu made a will, according to the custom of Hawaii, leaving all her property, including the land in question, to Kalakaua, and although she appears to have been suspicious of her husband (by whom she had no children), yet at the suggestion of Kekuanaoa, Governor of Oahu, in whose presence the will was made, Kinimaka was made guardian of the child. To this Kinimaka agreed (Tr. pp. 144, 145, 146, 156, 157, 158). The arrangement was duly reported to the King and it was directed that David should be the Konohiki under the King (Tr. p. 156). Kinimaka declared: "The place was David's, and that he was to take charge of it while he, (David,) was young" (Tr. p. 158).

The statement in the opinion (Tr. p. 18) that the King disapproved of the will and awarded the land to Kinimaka is not in accordance with the testimony of Governor Kekuanaoa. His testimony is that the Premier said so (Tr. pp. 145, 141), and this statement was disregarded as immaterial by Justice Robertson on the hearing on the will (Tr. p. 142). After the death of Kaniu, Kalakaua lived on the property, was recognized as its Konohiki, and Kinimaka had charge of it for him (Tr. pp. 155-158).

Kinimaka applied, in his own name, on July 14, 1846, to the Board of Land Commissioners (Tr. p. 180) for the land, claiming, with reference to this lot, "It is mine from Liliha. Kahikona is the wit-

ness" (Tr. p. 182). The testimony before the Land Commissioner showed otherwise, that it was Kaniu's (Tr. p. 156). On April 10, 1849 (Tr. p. 170), an award was made to Kinimaka (Tr. p. 170), upon which a Royal Patent issued August 30, 1853 (Tr. p. 174).

David Kalakaua came of age in 1856 (Tr. p. 129), and on the 29th day of December, 1856, filed a bill in equity in the Supreme Court, which had jurisdiction of such matters, against Kinimaka, alleging his birth in 1836; his living with Kaniu as her adopted child; that Kaniu was seized of certain lands—13 in number,—including the land in question; her death, leaving a husband but no issue; the making of the oral will devising the property to him, according to the custom of the country; Kinimaka becoming his guardian and procuring the award to himself; that Kinimaka held the legal title in trust, which trust it was prayed might be declared (Tr. pp. 125, 8). Service was made on Kinimaka, who died January 24, 1857, without having answered the bill (Tr. p. 127).

On March 16, 1857, suggestion of the death of Kinimaka was made, and that the heirs by his will were his three minor children—Kaniu; David Leleo, father of Mary H. Atcherley, the respondent; and Moses Kapaakea,—praying that they be made parties and that a guardian *ad litem* be appointed and a time set for hearing (Tr. pp. 127, 138).

Kinimaka's will devised the premises to Kaniu, a daughter, for her life; then to David Leleo, a son, for

his life; after his death, to Moses, another son, in fee (Tr. p. 130).

On March 6, 1858, Kalakaua applied for probate of Kaniu's oral will, and for appointment as administrator. A guardian *ad litem* was appointed to represent the three minor children of Kinimaka, to whom citation was issued, as well as to Pai, the widow. After a full hearing, at which the heirs were represented by counsel, the will appearing to be executed in accordance with the customs then existing in Hawaii, was duly admitted to probate by Judge Robertson of the Supreme Court. Approval by the King was held unnecessary, notice of the will being alone required, and attention is called to the fact that Kalakaua commenced proceedings to recover the property soon after becoming of age. (Tr. pp. 127, 140, 143.) (*Estate of Kaniu*, 2 Haw. 82.)

On July 19, 1858, a new bill was filed by Kalakaua, setting out substantially the facts of the previous bill, but praying only for 4 lots of land, instead of 13, one being the land in question. The bill seeks to declare a trust, on the ground that the awards were fraudulently procured by Kinimaka and that he and his heirs held them in trust for Kalakaua, to whom they were bound to convey (Tr. pp. 127, 128, 149-151). Process was issued and served on the widow, and on Richard Armstrong as guardian of the minors, who had been appointed, April 24, 1858, administrator and guardian in place of one Beckwith. He filed an answer, in substance, pleading ignorance of the main averments, but setting up the defense

that, even if wrongfully issued to Kinimaka, the awards were issued on testimony produced to the Board of Commissioners which satisfied that board that Kinimaka was entitled to the award (Tr. pp. 128, 153, 155).

At the trial, evidence was given in support of the bill, including evidence of the Secretary of the Land Commission showing that the only evidence in reference to the land in question was that, while Kinimaka applied to the King for the land, Kaniu received it (Tr. pp. 155, 159).

The defense admitted the devise to Kalakaua and the guardianship (Tr. p. 155), but claimed that the King had taken it back at the Great Mahele and, through the Board of Land Commissioners, made an award to Kinimaka; that no appeal had been taken from the award, which was therefore final, and Kalakaua was now estopped (Tr. p. 158). The answer was that the King had no power to take back, that Kinimaka held the land as guardian, was bound to make his trusteeship known, and therefore held as trustee (Tr. pp. 158-159).

A discontinuance was entered, excepting as to the land in question and one other land, and a final decree entered on the same day, November 2, 1858, directing Armstrong, as guardian, to convey the lands left in the suit (Tr. pp. 129, 159, 160).

While there is no evidence of the actual occupation of the premises between 1857 and 1870, there is no evidence of any change in its occupation, and in 1858 Armstrong took a mortgage from Kalakaua

describing the land as granted by the decree (Tr. p. 10); in the year 1867 Kalakaua mortgaged the premises to other persons; in 1868 conveyed them to his wife, Kapiolani, with whom he lived on the premises; with her he occupied the premises as a home until 1874, when he became King, and thereafterwards occupied the premises as a private home until his death in 1891; Kapiolani occupied them until her death in 1898, and since then they have been occupied by her grantees, her nephews and their successors, and the petitioner, Lewers & Cooke, Limited, who have the title from Kalakaua. There was no adverse possession by any of the heirs of Kinimaka; in fact, both the sons lived on the premises under Kalakaua as royal guards during part of the time (Tr. p. 129).

The land court found that there was a bar by the statute of limitations against Kaniu, the first life-tenant, who sold her interest to David Leleo, the second life-tenant, in 1880. The respondent, Mary Atcherley, is one of the heirs of David Leleo, who died in 1884. Kaniu, the first life-tenant, died in 1901, and Moses, the remainderman, conveyed to Mary H. Atcherley, the respondent, in 1897, for a consideration of \$50. The latter brought suit in 1901 in ejectment against the Kapiolani Estate, Limited, which thereupon brought an action in equity in the Circuit Court of the First Circuit for an injunction, setting up all the facts herein set forth in an amended bill, which was filed pursuant to a stipulation, viz., that as both parties wished to

have the question of *res judicata* adjudicated and settled before proceeding further, a demurrer should be filed which should be sustained *pro forma* and the plaintiff should appeal, which was done (Tr. p. 130).

On April 7, 1903, a decision was rendered by the Supreme Court upon this appeal (14 Haw. 651), the decree appealed from being reversed, the demurrer overruled and the case remanded for further proceedings.

Judge Perry in his opinion recites the facts; calls attention to the defense in the action of 1858 that the Board of Land Commissioners, having made an award, and no appeal having been taken, the award is final and the complainant estopped; construes the decree of 1858 as ordering the conveyance of the interest of the minors; overrules the main contention that the minors were not bound by the decree, since they were not served; holds that the attack is a collateral one, as the complainant's bill has for its sole object "the enforcement of the decree;" and declines to re-examine the decree upon its merits, as the wards' interests were fully defended in the original decree, which had been acquiesced in by all concerned for 44 years.

The concurring opinion of Chief Justice Frear distinguishes the case from that of *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552, on the ground that in that case "the prior decree was in consequence of the consent and not of the judgment of the court" and therefore not *res adjudicata*;

quotes 71 Fed. 324 to the point that that decree was both incomplete and by consent; points out that it would be practically impossible, owing to the lapse of time and the death of witnesses, to go into the merits of the former decree after 40 years' possession under the decree, and holds, as to the question of failure to serve the minors, that it was a matter of error rather than of jurisdiction and not subject to collateral attack.

The head-note prepared by the judges summarizes the opinion as declaring that a decree should not be opened up, as a matter of discretion, after 40 years' sole and undisputed possession of the land, where the decree is not incomplete, was adversary and not by consent (Tr. p. 183).

The case was remitted to the circuit court, the demurrer overruled, an answer filed, and this case, as well as the ejectment case, is still pending.

At this stage of the litigation, on May 29, 1905, the Kapiolani Estate, Limited, for a consideration of \$35,000, conveyed by warranty deed to Lewers & Cooke, Limited, the premises in question, being nearly all of Land Commission Award 129 and a lot described in Land Commission Award 729. The improvements on the premises were assessed for \$10,000 in 1906.

On January 29, 1906, the petition in question was filed in the Court of Land Registration (Tr. p. 3). Mary H. Atcherley appeared, claimed title, and the parties agreed to submit the question to the Court of Land Registration, notwithstanding the equity

suit and suit in ejectment (Tr. p. 131). The decision of the land court was rendered September 16, 1907, in favor of the petitioner, holding that the petitioner and its predecessors had been in the open, notorious and hostile, continuous, adverse possession of the premises under color of title since 1858, but intimates, without deciding, that as to Mary H. Atcherley the statute did not begin to run until the death of Kaniu in 1901 (Tr. p. 9); that there had been an acquiescence in the decision of 1858; that Kalakaua and his successors in title dealt with the property in reliance upon the title as declared by that decree; that the contention that the court had no jurisdiction of the subject-matter of the suit, because of the award of the Land Commissioners, had been overruled by Chief Justice Allen in that suit, and, even if erroneous, it was settled as to this case and should not be disregarded; that the matter is *stare decisis*; and found for the petitioner (Tr. pp. 9, 10).

From this decision Mrs. Atcherley appealed to the Supreme Court, which held that the Land Commission Award was a final adjudication of all claims to the land awarded existing prior to December 10, 1845, and that a bill alleging a breach of fiduciary duty in the obtaining of the award and the decree of 1858 ordering the guardian to convey the land was a collateral attack on a Land Commission Award, was erroneous as a matter of law, and that the Court of Land Registration should not enforce it.

A rehearing was denied, the case remanded to the land court for further proceeding, which, in pursu-

ance of the opinion of the Supreme Court, denied the petition (Tr. p. 47), and, on appeal, this decree was modified as to a minor point not involved here, and affirmed.

From which decree appeal is taken to this court.

ERRORS ASSIGNED.

1. The Supreme Court of Hawaii erred in overruling the discretion of the Court of Land Registration in following the decision of the Supreme Court of Hawaii in the case of Kapiolani Estate, Limited, v. Mary H. Atcherley, and refusing to reopen the decree of 1858. That being a question of fact, and an appeal being allowed only on points of law, the Supreme Court had no right to substitute its own discretion for that of the Court of Land Registration.

2. There is error in reversing said decision of the Court of Land Registration, since the evidence shows that Lewers & Cooke, Limited, have a legal title to the land described, which they are entitled to register, as it will be presumed, under the facts found, that a deed has been executed in pursuance of the decree of 1858.

3. There is error in reversing the decision of the Court of Land Registration, since that decision shows that Lewers & Cooke, Limited, have the equitable title to the premises under the decree of 1858, which they are entitled to register.

4. There is error in holding that the decree admitting the will of Kaniu to probate is not a binding adjudication upon the respondent, Mary H. Atcherley, that Kalakaua was, after the death of Kaniu, down to and at the time of the award, beneficially entitled to the premises in question awarded and patented to Kinimaka, and that Kinimaka held the same as his trustee and guardian.

5. There is error in holding that the decree of November 2, 1858, is not a conclusive adjudication between the parties that Kinimaka took the award

and patent in question in trust, and that Kalakaua and his successors in interest, including petitioner, were and are equitable owners, entitled to a conveyance of the legal title; and that the said decree is a complete and final decree, and in holding that said decree is not a complete and final decree, not subject to be reviewed or reopened in this proceeding.

6. There is error in holding that said decree, if not adversary in its character, but entered by consent, was not entered upon a valid consideration, viz., claims to other land, and that such consent decree, having been acted on and assented to for more than 40 years, can be disturbed at this time.

7. There is error in holding that the decision of the Supreme Court of Hawaii in Kapiolani Estate, Limited, v. Mary H. Atcherley is not an adjudication binding on said Mary H. Atcherley, conclusively determining that the decree of November 2, 1858, is a complete decree and will not be reopened or reviewed after 40 years.

8. There is error in holding that the decision in the case of Kapiolani Estate, Limited, v. Mary H. Atcherley, having been rendered under a stipulation entered into for the purpose of determining whether the decision rendered November 2, 1858, was *res adjudicata*, is not a conclusive adjudication as to this property as against the said Mary H. Atcherley.

9. There is error in holding that the decree admitting the will of Kaniu to probate, the decree of December 2, 1858, and the decision in the case of Kapiolani Estate, Limited, v. Mary H. Atcherley are not, and each of them is not, a rule of property laid down by the highest court of the jurisdiction in reference to the identical property in litigation, which should be followed by the Court of Land Registration, and the title of the petitioner registered.

10. There is error in holding that the decisions last referred to should not be followed on the principle of *stare decisis*.

11. There is error in holding that Lewers &

Cooke, Limited, having bought on the faith of the decisions herein set forth, which had become part of the law of the land, and particularly the law of this land, were not entitled to rely on said decisions and that the Court of Land Registration should have followed said decisions in rendering its decree registering their title; and particularly in holding that the petitioner had no right to rely on the last named decision because there was no decree, and because it was rendered on demurrer, since the facts in the case are conceded to be the same as those presented in the bill demurred to; and there is further error in holding that petitioner was only entitled to rely on the general principles of law announced.

12. There is error in holding that it is not a violation of the Constitution of the United States, a taking of property without due process of law, an impairment of the obligation of a contract, to hold that the petitioner, who bought relying on the faith of the decision of the Supreme Court of Hawaii in the case of Kapiolani Estate, Limited, v. Mary H. Atcherley that the decree of November 2, 1858, was a binding adjudication on the respondent, susceptible of being enforced, is not entitled to enforce said decree and register its title.

13. There is error in holding that the courts of equity of the Supreme Court of the Hawaiian Islands had not in 1858, and had not at all times, jurisdiction to declare the awardee under a Land Commission Award trustee for one equitably entitled to the land so awarded under equity as existing at the time of the award and not presented for decision in the Land Commission proceedings.

14. There is error in holding that under the evidence in this case, in holding that David Kalakaua and his successors, including the petitioner, is not equitably entitled to the premises in controversy, and that the respondent does not hold the same as trustee for the petitioner, who is equitably entitled to demand a conveyance.

15. There is error in holding that Mary H. Atch-

erley and her predecessors in title had not been guilty of laches and are not estopped to seek to review or set aside the decision of November 2, 1858.

ARGUMENT.

I.

IT WAS ERROR TO OVERRULE THE DISCRETION OF THE COURT OF LAND REGISTRATION IN DECLINING TO REOPEN THE DECREE OF 1858.

If the decree of 1858 could be reopened, whether it could be reopened was in the discretion of the land court.

All three opinions in *Kapiolani Estate v. Atcherley* follow this court in laying down the rule that it is, at most, a discretionary matter, upon all the facts of the case, whether a decree once entered in a court of chancery shall be reopened on a bill seeking to execute that decree, and the head-note of the case distinctly states this rule (Tr. pp 183, 190, 191, 192, 193). This rule is recognized in the present case, in the original opinion (Tr. p. 25), and upon rehearing, where it is said of the proposed action by the Circuit Court, following the decision in *Kapiolani v. Atcherley*, that it was "apparently to be a matter of discretion" (Tr. p. 45).

In the case of 1903 the Circuit Court sustained a demurrer to the bill, and therefore had no occasion to exercise its discretion. The Supreme Court held that in the exercise of its discretion it should refuse

to reopen the decree. In the present case the land court, following that decision, exercised its discretion and refused to reopen the decree on the facts before it: (1) That the decree had been acquiesced in and that Armstrong, the guardian, had taken a mortgage from Kalakaua immediately after the decision, describing the premises as "granted to D. Kalakaua by a decree of the Chief Justice of the Supreme Court;" (2) that Kalakaua and his successors had dealt with the property in reliance on the title as declared; (3) that in the case in 1858 the same points were made as here, and that Chief Justice Allen, after consideration, decided that he had jurisdiction; (4) that the Supreme Court in 1903 ruled that the court in 1858 had jurisdiction of the parties, and that the decree was rendered after a hearing on the merits; (5) that, whether the decree of Chief Justice Allen was right or wrong, the decision is now *stare decisis*, and that property rights have been built up on the faith of that decree and the acts of the parties thereunder.

This question of fact is not reviewable on appeal.

"Judicial discretion, in its technical legal sense, is the name of the decision of certain questions of fact by the court."

Darling v. Westmoreland, 52 N. H. 401; 13 Am. Rep. 55; 14 Cyc. 384.

It is familiar law that the granting and refusing of a new trial is a matter of discretion on the facts, from which there is no appeal. So an application to

intervene, etc. (*Central Trust Co. v. Grant Locomotive Works*, 135 U. S. 207); an application to revive a suit which has abated by death (*Davis v. Braden*, 10 Pet. 286); a motion to stay execution in a case where the debt has been attached (*Early v. Rogers*, 16 How. 599); entering a judgment *nunc pro tunc* (*Slicer v. Bank of Pittsburg*, 16 How. 571); opening a default, or setting aside a judgment (*McAllister v. Kuhn*, 96 U. S. 87; *United States v. Estudillo*, 1 Wall. 710; *Rio Grande Irrigation and Colonization Co. v. Gildersleeve*, 174 U. S. 602).

No abuse of discretion on the part of the land court.

In the face of the decision of the Supreme Court in 1903, it can hardly be contended that it was an abuse of discretion on the part of the land court to decline to open up the decree. Two of the acts of the parties referred to, which alone ought to be sufficient to justify the exercise of the discretion, are that Mary H. Atcherley paid \$50 for her title; while the appellant paid \$35,000 after the case had been decided in 1903.

In reaching this conclusion, the Supreme Court of Hawaii has ignored and overruled the findings of fact of the land court, which sustained the equity of appellant.

The cases mainly relied on by the Supreme Court of Hawaii hold that it is the duty of a court of equity, in the exercise of its conscience, to defeat "apparent

injustice" and to refuse to enforce decrees which have "ill foundations." The fundamental fact in this case, on which the equity of Kalakaua depended, is that he was the owner of this land and, by fraud, his guardian deprived him of it, which has never been denied in any court in which the matter has been tried. It is true that in an exhibit attached to the original petition it is stated that he acquired the land from Liliha. But the uncontradicted evidence in the land court showed that it was his wife's land, and not acquired from Liliha; this was admitted in the equity case in 1858 (Tr. p. 155); and the defense has been that a court of equity could not look into his fraudulent act, because it had culminated in a decree of the land court. The "apparent injustice" and "ill foundation" which troubles the conscience of the Supreme Court of Hawaii is an alleged erroneous decree by the Supreme Court in 1858, which restored the land to Kalakaua, who had been defrauded, which decree has been acquiesced in for 40 years by all parties. To bring the case within the Lawrence Mfg. Co. case, the Supreme Court of Hawaii say that the decree of Chief Justice Allen was rendered without any decision of this grave question of law and was apparently a compromise decree, consented to by the guardian (Tr. p. 25)—a fact which is in conflict with the finding of Judge Weaver, who found as a fact that the question of jurisdiction was decided by Chief Justice Allen and that the decree was rendered after a hearing on the merits (Tr. pp. 9, 10).

II.

LEWERS & COOKE, LIMITED, HAVE A LEGAL TITLE TO THE LAND, SINCE IT WILL BE PRESUMED THAT A DEED HAS BEEN EXECUTED.

Adverse possession was found by the Land Registration Court (Tr. p. 9), and while, ordinarily, a deed would not be presumed against a reversioner, but merely against the life tenant, the deed, which would be presumed here being from the guardian under the order of the court, would be presumably in accordance with the decree and would convey the reversioner's interest as well as the life tenant's.

Kaai v. Mahuka, 5 Haw. 354.

Fauntleroy's Heirs v. Henderson, 51 Ky. 447.

The presumption is further strengthened by the guardian's taking a mortgage reciting that the title had been granted by the decree (Tr. p. 10).

III.

THE EQUITABLE TITLE IS IN LEWERS & COOKE, LIMITED.

Land Tenures in Hawaii before the Mahele.

"When the islands were conquered by Kamehameha I., he followed the example of his predecessors, and divided out the lands among his principal warrior chiefs, retaining, however, a portion in his hands, to be cultivated or managed by his own immediate servants or attendants. Each principal

chief divided his lands anew, and gave them out to an inferior order of chiefs, or persons of rank, by whom they were subdivided again and again; after passing through the hands of four, five or six persons, from the King down to the lowest class of tenants. All these persons were considered to have rights in the lands, or the productions of them. The proportions of these rights were not very clearly defined, but were nevertheless universally acknowledged.

"The tenures were in one sense feudal, but they were not military, for the claims of the superior on the inferior were mainly either for produce of the land or for labor, military service being rarely or never required of the lower orders. All persons possessing landed property, whether superior landlords, tenants or sub-tenants, owed and paid to the King not only a land tax, which he assessed at pleasure, but also, service which was called for at discretion, on all the grades from the highest down. They also owed and paid some portion of the productions of the land, in addition to the yearly taxes. They owed obedience at all times. All these were rendered not only by natives, but also by foreigners."

Statute Laws of Kamehameha III., Vol. II,
1847, p. 81.

The Great Mahele.

In this condition the King, by the Great Mahele, surrendered the allodial ownership of the land, reserving certain portions to the crown, certain portions to the King personally, and certain portions for the public use. This was done with a desire to conform, in the main, to the civilized order of things, that a regard might be had to an immutable right of property. "The holder must have some stake in it more solid than the bare permission to evolve his

daily bread from an article, to which he and his children can lay no intrinsic claim."

Purposes and Powers of the Board of Land Commissioners.

Commissioners were appointed, upon whom was conferred all the private and public power over property belonging to the King. In the principles which are set forth by the commissioners, a great liberality in the matter of evidence and in deciding is declared, and the commissioners are only authorized to "ascertain the claimant's kind and amount of title and to award for or against that title." Among the benefits set forth are the separating of the rights of the king and government from that of the owner, leaving him a free agency in the independent proprietorship, enabling him to use his property more freely by mortgaging it and building upon it, with the definite prospect that it will descend to his heirs; and that the patents, being for certain fixed and ascertained dimensions of land, this would prevent litigation in regard to boundaries; and that, all parties having been cited, there can be no counterclaim to the same land after award; that subsequent purchasers and mortgagees need not be in ignorance of prior defects or of prior incumbrances, but when there are counterclaims the board will confine their inquiry to which of the claimants has the freehold; and that the titles to all land not presented shall revert to the government. (See Appendix.)

Thurston v. Bishop, 7 Haw. 421.

The act under which the Board was appointed is Article IV of Chapter IV of the Statute Laws of Kamehameha III., page 107.

Rights of Guardians.

At the time of making this Award, April 10, 1849, the guardian had the absolute control and management of the ward's property, with the power to dispose of the same without the necessity of any order of court.

Kamehameha v. Kahookano, 2 Haw. 118.

Laanui v. Puohu, 2 Haw. 161.

He could grant a right of way or make any conveyance whatever.

Kamehameha v. Kahookano, ubi supra.

He could assign lands to the widow.

Laanui v. Puohu, ubi supra.

It was his duty to present the ward's claim to the Board of Land Commissioners; and if he failed to present it, the ward was barred.

Thurston v. Bishop, ubi supra.

The acts of the guardian "bound his infant ward in respect to claims before the Land Commissioners as fully and conclusively as if they had been done" by the minor of full age.

Thurston v. Bishop, ubi supra.

And the failure of the guardian to present a claim was equally binding upon the infant.

Thurston v. Bishop, ubi supra.

Had the guardian done his duty, the proceedings would have been the same, excepting that the award and the patent would have issued to "Kinimaka no Kalakaua" (that is, Kinimaka *for* Kalakaua), as in the case of *Kalakaua v. Keaweamahi*, 4 Haw. 577, and as was done in hundreds of similar cases.

But the law does not allow the guardian to put himself in a hostile position to the ward, or to create a title adverse to him.

"They took a title from one who not only had none, but who could not be permitted to show that he had one, at least until he had surrendered his guardianship and the possession of the estate to his wards and put himself thereafter in a hostile position to them."

Lono v. Phillips, 5 Haw. 357, 359.

The effect of the award on existing instruments or agreements affecting the title.

Although never directly decided, it has always been impliedly admitted that a deed, mortgage, instrument or agreement affecting the title awarded is unaffected by the award; and, in the case of *Laanui v. Puohu*, the award being to Laanui, the guardian of the children of the awardee having agreed with the widow that the property should be assigned to her, it was held that it would have at least this effect in equity, the court saying:

"But, supposing the assignment was not sufficient in point of law to convey the lands, it would form a title in equity sufficient to repel the complainant's claim. It would authorize a Court to decree a con-

veyance of the legal estate from the heirs of Laanui, if the legal estate were in them."

Laanui v. Puohu, ubi supra.

The equitable assignment was on May 26, 1851; the Land Commission Award January 3, 1854.

Again, in the same case, the patent having issued to the equitable assignee, it is said this "was carrying out the purpose of the award to convey to the assigns of the original claimant."

In another case, decided later, where the award was made to Kalamau on the 1st day of April, 1850, who had made a deed to one John Meek on the 26th day of February of the same year, which deed was not recorded, it was held that the title inured to Meek by virtue of the deed.

Kaaihue v. Crabbe, 3 Haw. 768.

Again, it was held that a right of way which had been given was not destroyed by an award of the Land Commissioners which reserved no right of way. It is true that this is put upon the ground that a right of way was not a title to the soil, but a right to pass over it. An equitable right is not a title to the soil.

Jones v. Meek, 2 Haw. 9.

Jurisdiction of the Court.

Under the Constitution, the judicial power extended to all cases in Law and Equity (Constitution of 1852, Art. 84); and the Chief Justice was the Chancellor of the Kingdom and exercised jurisdiction in equity, subject to appeal to the full court (Art. 86).

Under the original act organizing the judiciary department in the Hawaiian Islands,

“The reasonings and analogies of the common law, and of the civil law, may in like manner be cited and adopted by any such court, so far as they are deemed to be founded in justice, and not a conflict with the laws and usages of this kingdom.”

Third Act Kamehameha III, Chapter I, Section IV (1847) (Appendix).

And by the same Act, Chapter IV, Article III, Section VIII, the Chief Justice, subject to appeal to the court, had

“power at chambers, to entertain bills in equity for the discovery of fraud, or of facts important to any complainant; and to enforce, by bill and decree in equity, hypothetical rights of property; . . . to relax the strict rules of law applicable to any case, or to enlarge or restrain the meaning of the law, when the strict application thereof would work injustice to a party.”

“Said chief justice shall have all the equity powers incident at common law to the office of Chancellor.” (Section IX.)

“They shall have full powers to compel executors, administrators and guardians to the performance of their trusts.” (Section XVIII.) (See Appendix.)

By the Act of May 26, 1853, organizing the judiciary, passed after the adoption of the Constitution of 1852, by Section 2, jurisdiction is granted to the Supreme Court in law and equity, with all the powers, legal and equitable, of the present court; by Section 4 the Chief Justice was given jurisdiction in chambers as Chancellor in equity; by Section 5 the

Supreme Court was given jurisdiction over inferior tribunals, where no other remedy provided. (See Appendix.)

In 1855 the court had declared its jurisdiction in an action to reach property to apply on an execution, quoting from a New York case and also from a distinguished jurist whose judgment in an equity matter is relied on by the Hawaiian Court in the case at bar.

“That in such a case the creditor ought to have relief somewhere, is manifest. According to the plainest principles of justice and equity, every person ought to pay his honest debts; and if he is able but unwilling, the law ought to compel him to do so; but if courts of law, from any defect of power, are unable to afford an adequate remedy for that purpose, then we must turn to the court of chancery, and look for aid from thence. In the emphatic language of Woodworth, J., in the case of *Hadden v. Spader*, 20 Johnson 562, ‘It would be matter of surprise as well as regret, if in a system of jurisprudence that has been matured by the wisdom of ages, adequate remedies were not provided for the violation of every important civil right.’

“Lord Redesdale observed, in *Bond v. Hopkins* (1 Sch. & Lef. 420), ‘Nothing is better settled in Courts of Equity, than that, where a title exists at law, and in conscience, and the effectual assertion of it at law is unconscientiously obstructed, relief should be given in equity; and that when a title exists in conscience, though there be none at law, relief should also, though in a different mode, be given in equity.’”

Dana v. Angel, 1 Haw. 347, 350.

In 1860, Mr. Justice Robertson, discussing the jurisdiction of a court of equity, said:

"Courts of Equity do sit to enforce, in many cases, the observance of a legal or technical morality between parties who assume towards each other those relations which peculiarly demand the exercise of mutual good faith."

Montgomery v. Coady, 2 Haw. 322.

Chief Justice Allen, who delivered the judgment in question, in 1862, in a case involving a resulting trust, held that it might be established by parol evidence in case of fraud or mistake as to land, and that a trust could be established where the consideration of a deed moved from another and not the grantee, and that the trust might be shown by parol proof in opposition to the language of the deed. Thus, where a respondent has purchased the estate with a knowledge of the trust, the conveyance will be subject to it, quoting Chancellor Kent, that a trust is merely what a use was before statute of uses. "It is an interest resting in conscience and equity," and in exercising its jurisdiction the "court of chancery is not bound by the technical rules of law, but takes a wider range in favor of the interest of the party."

Montgomery v. Montgomery, 2 Haw. 553.

In 1871, in an action in ejectment, the plaintiff sought to set aside a patent issued to a third party on an award to him; but the court held:

"It is not denied that a patent conveys only a legal title, and leaves the equities open. *Brush v. Ware*, 15 Pet. 93. But we merely decide that a patent valid on its face is good in law as the best evidence of title, and that the equities can only be

reached in a Court of Equity, and not by an action of ejectment. Otherwise, a Royal Patent 'would fail to be as it was intended it should be, an instrument of quiet and security to its possessor.' *Beard v. Federy*, 3 Wallace 492.

"The authorities cited in the brief of the defendant's counsel are conclusive, that a patent not void on its face, or appearing to be issued contrary to law, or without authority, can not be impeached collaterally in a court of law, and that in order to set aside a patent for mistake, fraud, or other reason, application must be made to a Court of Equity. *Green v. Liler*, 8 Cr. 250; *Stoddard v. Chambers*, 2 How. 318; *Stringer v. Young's Lessee*, 3 Pet. 344; *Minter v. Cromelin*, 18 How. 87; *Bagnell v. Broderick*, 13 Pet. 436; *Fenn v. Holman*, 21 How. 481; *Field v. Seabury*, 19 How. 322; *People v. Livingston*, 8 Barb. 253."

Davis v. Brewer, 3 Haw. 270.

Thereupon, in 1872, a bill in equity was brought by Davis, in which it was sought to set aside, not only the patent, but a judgment upon which it had been obtained; the court saying:

"When an allegation is made that there was a fraud on the absentee whose rights were thus apparently adjudicated, a person may show if he can that the apparent fraud was real, without impeaching the validity or conclusiveness of the judgment within the meaning of the above rule, for, as Lord Coke says, fraud is something which 'vitiates the most solemn judicial proceedings, ecclesiastical or temporal.' But it must be a clear and apparent case of fraud. See *Patch v. Ward*, 3 Eng. Ch. App., 206 (1867)."

Davis v. Brewer, 3 Haw. 359.

In 1873 Chief Justice Allen held that equity had

jurisdiction to set aside erroneous distribution in a probate court.

Wei See v. Young Sheong, 3 Haw. 489.

While it has been held that a decree admitting a will to probate will not be set aside, since the probate court itself has that power, yet in that case it was declared that the general rule is that equity will relieve against every species of fraud and so may set aside or annul decrees or judgments obtained through fraud.

Akeau v. Iakona, 13 Haw. 216.

The doctrine that judgments can be set aside for fraud has been frequently recognized in this jurisdiction.

Norris v. Herblay, 9 Haw. 514.

Mills v. Briggs, 4 Haw. 506.

See Hop v. Parke, 6 Haw. 688.

Hackfeld v. Bal, 6 Haw. 364.

See, also:

Perry v. Lucas, 11 Haw. 350.

Kapea v. Moehonua, 6 Haw. 49.

Effect of the judgment of the Probate Court.

The minors having been represented at the probate of the will by their guardian *ad litem*, and having contested the probate, are bound by that judgment.

“In this kingdom, as in those of the United States spoken of above, the Courts of Probate established by statute possess exclusive jurisdiction in the matter of probate of wills, and that, too, without any dis-

inction being expressed as to whether they are wills of real estate, or wills of personalty. It would seem to follow therefore that the probate of a will, duly obtained, and being unrevoked, ought to be received as conclusive evidence of the validity and contents of the will. The mode of proof of wills in this kingdom is according to what is termed 'the more solemn form of law,' that is *per testes*, upon due notice and hearing of all parties concerned. And a judgment of one of our Probate Courts upon the validity of a will, being the judgment of a competent court of exclusive jurisdiction directly upon the subject matter in controversy, and the same being in the nature of a proceeding *in rem*, in which all persons may appear and be heard upon the question, we think it ought to be regarded as binding upon all parties, and entirely conclusive.

"If the probate has not been duly obtained, the proper remedy is by appeal to the Supreme Court or by application to the Judge of Probate, for a new hearing and revocation of the probate; but the validity of a will cannot be questioned in another court in the indirect manner contended for in this case."

Keliipelapela v. Pamano, 1 Haw. 503, 505.

Equitable title of Kalakaua.

Chief Justice Allen was sitting in a court having full equity powers, with jurisdiction of the parties, one of whom, Kalakaua, was the devisee of the property in question under the will of his adoptive mother, who had left it to him in charge of Kinimaka, who had agreed to be his guardian to take care of the property for him, which gave Kinimaka a power over the land sufficient to sell and made it his duty to present the claim to the Board of Land Commissioners. He had presented the claim; but procured an award to himself instead of to his ward.

Judge Allen was bound by the decision of Judge Robertson in probate, who held that Kalakaua was the equitable owner of the property and that Kinimaka was his guardian under the will of Kaniu; the uncontradicted evidence in the case established this fact; nor did defendants dispute it. The answer made for them was that the Land Commission Award was issued to Kinimaka, without reference to Kalakaua. In other words, the answer to the charge that the guardian had been guilty of fraud is that the guardian has successfully perpetrated the fraud. If it be said that the answer is that Kalakaua should have presented his own claim, that duty, under the cases cited, was upon Kinimaka, his guardian. In other words, the answer is that Kalakaua is estopped to take advantage of the fraud of the guardian, because his guardian has not prevented the fraud. Under these circumstances, Chief Justice Allen in 1858, and the Court of Land Registration now, whether Chief Justice Allen's judgment is conclusive or not, is bound to decree that Kalakaua and his successors are the equitable owners of the land and entitled to the benefit of the award in favor of Kinimaka, the guardian.

The parties to the proceeding in 1858.

It is to us incredible that the court in 1908 should have come to the conclusion that Chief Justice Allen and his associates were wrong, in 1858, in regard to their powers. The participants in this judgment will bear examination. The Chief Justice who delivered

it, Elisha H. Allen, had a name then and afterwards well known throughout the United States—the only man who had ever beaten Hannibal Hamlin before the people—who died years afterwards Dean of the Diplomatic Corps at Washington.

Kalakaua, as we have said, afterwards became the King of the Hawaiian Islands. His attorney, C. C. Harris, a highly accomplished lawyer, was afterwards Chief Justice. The guardian, Richard Armstrong, was the Minister of Public Instruction, the father of Samuel C. Armstrong of Hampton, one of the ablest and probably the most independent man upon the islands, as shown by his famous reproof of Kamehameha III. for his intemperate habits from the pulpit of Kawaiahao Church. His attorney, Mr. Bates, was a lawyer, in full and successful practice, thoroughly able to defend the point raised by him and now presented anew. The principal witnesses were the first men of Hawaii: John Ii, whose testimony before the Land Commission was introduced, was at this time a Judge of the Supreme Court; Governor Kekuanaoa, father of Kamehameha IV and V, and Charles Kanaina, the father of King Lunalilo, were men of the highest standing in the islands.

Hawaiian cases cited by the court not in conflict with the holding of Chief Justice Allen.

Kukiiahu v. Gill, 1 Haw 90, is an action of trespass, in which the defendant, whose predecessor in title had been a party to the proceeding before the

Land Commissioners, was quite properly not allowed to attack the award on the ground of false evidence before the Commissioners.

Kalakaua v. Keaweamahi, 4 Haw. 577, is a decision in our favor. In that case the bill in equity was not brought till thirty years after the award, the parties being of age. It was held that "the award and Moehonua's possession under it constituted an adverse possession;" that the "award constituted an open and constant repudiation of any trust . . . it is notice to the plaintiff's grantor, and to those under whom she claimed, that he claimed the possession as owner" and "the circumstance that the title claimed was void or commenced in fraud of law, does not detract from the force of adverse possession commenced under it." Here Kalakaua commenced his action immediately.

In the Mahuka case there was no contention of any fraud; the contentions were (1) that the award was to Kaai as well as to Mahuka, and (2) that the evidence showed, contrary to the decision, that Kaai was a tenant in common. The bill brought, to declare a trust, was based on the evidence before the Land Commissioners, and the court declined to interfere after 32 years' undisputed ownership, simply because the heading of the award was to Mahuka and Kaai, while the land was awarded and patented to Mahuka, saying that Kaai may have relinquished his claim by an unrecorded deed which is now lost; that it would be presumed that he was aware of the award to Mahuka alone, and assented to it, in ac-

cordance with which was his whole conduct during life. This case would seem to be an authority that the whole conduct of the predecessors of Mrs. Atch-erley would estop them from claiming the land.

Kaai v. Mahuka, ubi supra.

The case of *Estate of Kekauluohi* (6 Haw. 172) was before a single judge, and decided by Mr. Justice Judd on the ground that there was not sufficient evidence to prove the lost will. What he says in regard to the *Estate of Kaniu* is unnecessary to the decision, and the weight of it is seriously affected by the fact that he joined in a decision seven years later, rendered in 1883, in which the case was cited with approval. (*Kalakaua v. Keaweamahi*, 4 Haw. 571.) This latter case being a full bench decision, and not by a single judge.

The decisions of this court sustain Chief Justice Allen's jurisdiction.

That such a suit will lie has been frequently determined. The general rule has been laid down by this court as follows:

"Where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title."

Johnson v. Towsley, 13 Wall. 85.

Stark v. Starr, 6 Wall. 419.

Bagnell v. Broderick, 13 Pet. 436.

Patterson v. Winn, 11 Wheat. 380.

Where one is agent of another to procure a patent, and, discovering a defect in the claim of his principal, procures the patent to be issued to himself, he will be held in equity to hold the title in trust for his principal.

Ringo v. Binns, 10 Pet. 269.

So in a case where one party acquired the property of another to prevent its being subject to the contractual claim of a third party, he was held as a trustee *ex maleficio* in respect to that property.

“ In Pomeroy’s Eq. Jur., Sec. 155, the author says, citing many cases: ‘If one party obtains the legal title to property, not only by fraud or by violation of confidence or of fiduciary relations, but in any other unconscientious manner, so that he cannot equitably retain the property which really belongs to another, equity carries out its theory of a double ownership, equitable and legal, by impressing a constructive trust upon the property in favor of the one who is in good conscience entitled to it, and who is considered in equity as the beneficial owner.’ And again, in section 1053: ‘In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one’s weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interests, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the

original wrongdoer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the property relieved from the trust. The forms and varieties of these trusts, which are termed *ex maleficio* or *ex delicto*, are practically without limit. The principle is applied wherever it is necessary for the obtaining of complete justice, although the law may also give the remedy of damages against the wrongdoer."

Angle v. Chicago, etc., R. R. Co., 151 U. S. 1, 26.

Moore v. Crawford, 130 U. S. 122.

"It becomes, then, the ordinary case of the party acquiring, by false and fraudulent means, a legal title to property to which another has the better right, and which he would have obtained, had the facts, as they existed, been truly represented. In such case equity will compel the holder of the legal title to transfer it to the party who was justly entitled thereto."

White v. Cannon, 6 Wall. 443.

So if an agent locates land for himself which he ought to locate for his principal, he is in equity a trustee for his principal.

Massie v. Watts, 6 Cranch. 148.

"According to the clearest and best established principles of equity, the agent who so acts becomes a trustee for his principal. He cannot hold the land under an entry for himself otherwise than as trustee for his principal."

Chief Justice Marshall in *Massie v. Watts*,
ubi supra.

"Courts of equity have full jurisdiction to relieve against fraud or mistake, and that power plainly

extends to cases where one man has procured the patent which belonged to another at the time the patent was issued."

Meador v. Norton, 11 Wall. 442.

"The substance of these authorities is that, wherever a person obtains the legal title to land by any artifice or concealment, or by making use of facilities intended for the benefit of another, a court of equity will impress upon the land so held by him a trust in favor of the party who is justly entitled to them, and will order the trust executed by decreeing their conveyance to the party in whose favor the trust was created."

Felix v. Patrick, 145 U. S. 317, 328.

Bernier v. Bernier, 147 U. S. 242.

"The only remedy of Emblen is by bill in equity to charge Weed with a trust in his favor. All this is clearly settled by previous decisions of this court."

Bockfinger v. Foster, 190 U. S. 116.

"The most solemn transactions and judgments may, at the instance of the parties, be set aside or rendered inoperative for fraud. The fact of being a party does not estop a person from obtaining in a court of equity relief against fraud. It is generally parties that are the victims of fraud. The court of chancery is always open to hear complaints against it, whether committed *in pais* or in or by means of judicial proceedings. In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it. Story, Eq. Jur., secs. 1570-1573; Kerr, Fraud and Mistake,

352-353. This subject was discussed in *Gaines v. Fuentes*, 92 U. S. 10 (XXIII, 524), and *Barrow v. Hunton*, 99 U. S. 80 (XXV, 407)."

Johnson v. Waters, 111 U. S. 640.

"Widdicombe, being a purchaser with full knowledge of their rights, was in law a purchaser in bad faith; and, as their equities were superior to his, they were enforceable against him, even though he had secured a patent vesting the legal title in himself. Under such circumstances, a court of chancery can charge him as trustee and compel a conveyance which shall convert the superior equity into a paramount legal title. The cases to this effect are many and uniform. The holder of a legal title in bad faith must always yield to a superior equity."

Widdicombe v. Childers, 124 U. S. 400.

"But whilst the patentee holds the legal title his equitable relations to other parties are not thereby affected. That title, with important qualifications hereafter mentioned, is as much subject to control as the title to land held by him derived from private sources. If one takes a title in his own name, whilst acting as agent, trustee or guardian, or in any other fiduciary capacity, a court of equity will, upon a showing of the fact in an appropriate proceeding, subject the lands to proper trusts in his hands or compel him to transfer the title to the party equitably entitled to it. Nor does it matter whether the party takes the title in his own name in good faith, under the belief that he can thereby better manage the property to the advantage of those for whom he is acting, or in compliance with their wishes, or whether from an intention to defraud them of their rights therein. In either case a court of equity will control the legal title so as to protect the just rights of the true owner. *Townsend v. Greely*, 72 U. S., 5 Wall. 326, 335 (18: 547, 549); *Estrada v. Murphy*, 19 Cal. 248. All this is but common knowledge, and the

doctrine is constantly invoked for the protection of the rights of parties against the mistake, accident or fraud of agents or parties acting in a fiduciary capacity."

Sanford v. Sanford, 139 U. S. 642.

"The only questions which can arise between an individual claiming a right under the acts done, and the public, or any person denying its validity, are, power in the officer, and fraud in the party. All other questions are settled by the decision made or the act done by the tribunal or officer; whether executive (*Marbury v. Madison*, 5 U. S. 1 Cranch, 170, 171 [2:71]); legislative, (*McCulloch v. Maryland*, 17 U. S. 4 Wheat. 423 [4: 605]; *Satterlee v. Matthewson*, 27 U. S. 2 Pet. 412 [7: 468]; *Providence Bank v. Billings*, 29 U. S. 4 Pet. 563 [7:956]); judicial, (*Perkins v. Fairfield*, 11 Mass 227; *McPherson v. Crenliff*, 11 Serg. & R. 429; adopted in *Thompson v. Toltie*, 27 U. S. 2 Pet. 167, 168 [7:385]); or special, (*Rogers v. Bradshaw*, 20 Johns. 739, 740; *Shand v. Henderson*, 2 Dow. P. C. 521, etc.), unless an appeal is provided for, or other revision, by some appellate or supervisory tribunal, is prescribed by law."

United States v. Arredondo, 6 Pet. 691, 729.

United States v. California & Ore. L. Co., 148 U. S. 43.

The Supreme Court of Hawaii sought to distinguish these cases on various grounds:

(a) That the act in regard to Mexican land grants in California provided that the decree and patent was "conclusive between the United States and the said claimants only, and shall not affect the interests of third persons." (9 St. L. 634.)

(b) That the other cases related to land patents issued by executive department, or adjudication by

a local board of limited jurisdiction, in which there was an absence of direct appeal, as provided in the Hawaiian statute.

But it has been repeatedly determined that the act in regard to private land claims in California includes perfect as well as inchoate or equitable titles, and that the only remedy is by appeal.

Botiller v. Dominguez, 130 U. S. 238.

Ainsa v. New Mexico & Ariz. R. Co., 175 U. S. 76.

The act provides for a confirmation rather than a quitclaim.

Boquillas Land & Cattle Co. v. Curtis, 213 U. S. 339.

Los Angeles F. & M. Co. v. Los Angeles, 217 U. S. 226.

And that act provided that all claims not presented within two years shall be deemed held and considered as part of the public domain of the United States.

9 St. L., 631, 633.

“Every question which could arise on the title claimed could come to and receive judgment from this court. The scheme of adjudication was made complete, and all the purposes of an act to give repose to titles were accomplished. And it was certainly the purpose of the act of 1851 to give repose to titles. It was enacted, not only to fulfill our treaty obligations to individuals, but to settle and define what portion of the acquired territory was public domain. It not only permitted, but required, all

claims to be presented to the board, and barred all from future assertion which were not presented within two years after the date of the act. Sec. 13. The jurisdiction of the board was necessarily commensurate with the purposes of its creation, and it was a jurisdiction to decide rightly or wrongly. If wrongly, a corrective was afforded, as we have said, by an appeal by the claimant or by the United States to the district court."

Thompson v. Los Angeles F. & M. Co., 180 U. S. 72, 77.

Moreover,

"The term 'third persons,' as there used, does not embrace all persons other than the United States and the claimants, but only those who hold superior titles, such as will enable them to resist successfully any action of the government in disposing of the property."

Beard v. Federy, 3 Wall. 478.

De Guyer v. Banning, 167 U. S. 723.

Barker v. Harvey, 181 U. S. 481.

Russell v. Maxwell Land Grant Co., 158 U. S. 253.

More v. Steinbach, 127 U. S. 70.

United States v. Cal. and Ore. Land Co., ubi supra.

California Powder Works v. Davis, 151 U. S. 389.

Herrick v. Boquillas L. & C. Co., 200 U. S. 96.

And,

"Trust relations respecting the property between

the patentee and others may be enforced equally with such relations between him and others respecting any other property."

More v. Steinbach, ubi supra.

Finally, it has been expressly declared that this clause does not change the operation of the general rule.

"Final decrees in other judicial proceedings affecting the title to property, are not conclusive except between the parties; they bind only them and their privies; they do not conclude the rights of third persons not before the court, or in any manner affect their rights. Third parties, with respect to the adjudications of the Board of Commissioners, and of the district court, on appeal from the Board, stand upon the same footing as they do with respect to other adjudications in the ordinary proceedings of courts of law."

Lynch v. De Bernal, 9 Wall. 315.

There is nothing in the Hawaiian act which would justify any distinction between the principles laid down in these decisions and the principles to be applied to the case of 1858.

As there is neither Hawaiian statute nor judicial precedent in conflict, these cases are binding on the Hawaiian court.

IV.

THE DECREE OF JUDGE ROBERTSON ADMITTING THE WILL OF KANIU TO PROBATE IS A BINDING ADJUDICATION THAT KALAKAUA WAS, AFTER THE DEATH OF KANIU, BENEFICIALLY ENTITLED TO THE PREMISES IN QUESTION.

We have assigned this as an error, although the court in its opinion does not distinctly deny the proposition, but apparently sustained the decision on the ground that the estate of Kaniu consisted of personal as well as real property. We have already pointed out that the petition does not so allege, and the decision does not so find. Moreover, the decision was rendered after a contest, in which the minors were represented by their guardian, who was appointed guardian *ad litem* in this estate and contested the probate. Such a decree is conclusive upon the parties and their successor, Mrs. Atcherley.

Keliipelapela v. Pamano, ubi supra.

V.

THE DECREE OF NOVEMBER 2, 1858, IS A CONCLUSIVE ADJUDICATION BETWEEN THE PARTIES, AND IS COMPLETE AND FINAL.

It was found by the Land Court that the decree was rendered after a hearing on the merits; that the court had before it the points made here, and that

Chief Justice Allen, after consideration, decided that he had jurisdiction. (Tr. pp. 9, 10.)

Proof of the fraud was ample and even admitted. The defense made was that the matter had been passed into a judgment by the Board of Land Commissioners. The minors, who were all under 11 years of age, were represented by their guardian and by counsel, the matter argued, and after ample time for consideration, it was decreed that the guardian should convey the land.

It is said that the court had no jurisdiction. It clearly had, but it is enough to answer that it had jurisdiction of the subject-matter. If it erred, it erred, as is said in *Kapiolani Estate v. Atcherley* (14 Hawaii), in the exercise of its jurisdiction; and this complete and adversary decree, assented to and acted upon for 40 years, without appeal, is conclusive on the parties.

"It seems to be pretty well settled that, as it is variously expressed, although neither consent nor negligence will confer jurisdiction in equity where none really exists, yet, when the case is not wholly foreign to equity jurisdiction, when it is not on its face such that equity could have no jurisdiction over it, as, for example, an action to recover damages for an assault, or for a libel or slander, when the defect is a want of equity and not a want of power, when the objection is merely that a plain, adequate and complete remedy at law exists or that equity is without jurisdiction in the particular case merely for some special reason or the absence of some particular element, when equity is competent to grant the relief sought and has jurisdiction of the subject-matter, when the case is not without traces of equity

jurisdiction, the question of the alleged want of jurisdiction may be waived and will be deemed to have been waived if not raised until the case comes to the appellate court. The latest case by the highest court in the land holding this way, that has come to our notice, is *Detroit v. Detroit Cit. St. R. Co.*, 184 U. S. 368, 381."

Kuala v. Kuapahi, 15 Haw. 300.

McChesney v. Kona Sugar Co., 15 Haw. 710.

"The supreme court of the district had jurisdiction over the subject-matter, the *res*. It had jurisdiction over the parties. It was, according to due course of equity proceeding, called upon to examine the will and the statute which gave the power to make the sale in certain circumstances. If, then, jurisdiction consists in the power to hear and determine, as has so many times been said, and the court errs in holding that a case has been made either under its inherent power or its statutory authority, can it be said that it has usurped jurisdiction and that its decrees are absolute nullities? To this we can not consent. If the court was one of general, and not special, jurisdiction, if, under its inherent power, supplemented by statutory enlargement, it had jurisdiction under any circumstances to sell the real estate of minors for reinvestment, it had jurisdiction to examine and determine whether the particular application was within or beyond its authority. To do this was jurisdiction. If it errs, its judgment is reversible by proper appellate procedure. But its judgment, until it be corrected, is a judgment, and cannot be regarded as a nullity."

United States v. Morse, 218 U. S. 493, 505.

Mellen v. Moline Malleable Iron Works, 131 U. S. 352.

The Hawaiian court, however, held that *in all cases* where a party asks the aid of a court of chancery to

execute a former decree, he does so at the risk of opening up that decree for re-examination, upon the authority of *Lawrence Mfg. Co. v. Janesville Cotton Mills*, 138 U. S. 552. This argument illustrates the necessity of examining a case to see what the court is talking about. The *Lawrence Mfg. Co.* case, as was said in a later case by Chief Justice Fuller, who rendered that decision, applied an "exceptional rule" (*New Orleans v. Fisher*, 180 U. S. 185) to a case where the plaintiff was seeking to piece out an incomplete decree and then have it enforced against a party included by inference in the stipulation for the decree, but not included in the decree itself, where the decree itself was not in accordance with the stipulation, and being a consent decree a court of equity was not bound to carry it out if erroneous, and the prior decree being in consequence of the consent and not the judgment of the court, the court declined to treat it as *res adjudicata*. In our case the decree was adversary and not by consent, was complete, and the facts do not fall within the exceptional circumstances of the *Lawrence Mfg. Co.* case. It rather falls within the case of *New Orleans v. Fisher*, where the court refused to interfere with the enforcement of a judgment challenged on the ground that there was no jurisdiction, when sought to be enforced by a creditor's bill, saying that it could not be thus attacked collaterally.

Taking up the cases cited by Chief Justice Fuller and by the Hawaiian court, *Wadhams v. Gay* (73 Ill. 415) and *Gay v. Parpart* (106 U. S. 679) are not

similar, since in those cases the decree was incomplete, was by consent, and there was no service upon the objecting party—three material distinctions. The decree was incomplete, in that no decree for conveyance had been made. Windett, whom the Hawaiian court on rehearing says stands in the same place as Lewers & Cooke, bought, knowing that a decree *pro confesso* had been taken against Catharine Parpart, without actual service, and which, under the laws of Illinois, would be set aside upon her appearance and motion—which had been done. *Wadhams v. Gay* holds that the decree was a consent decree, and it was set aside because of want of consideration, injustice, mistake, surprise and misapprehension.

Hamilton v. Houghton (2 Bligh 169) is distinguishable in various ways. In the original case the surviving trustee, the one necessary party, was not served. The decree was *pro confesso* and not adversary, and the head note holds that the original decree was “not conclusive until reversed by original bill or bill of review.”

Johnson v. Northey (Finch’s Prec. in Ch. 134) is also the case of a default decree. The creditors, who in the case before the court were seeking to enforce that decree, were not parties; there was a cross bill, in the nature of a bill of review, to set aside the original decree, and whilst the court seems to hold that they would go into the original decree, in fact the case was settled and a sale had under that decree.

In *Lawrence v. Berney* (2 Rep. in Ch. 127) there was a cross bill to review the original decree, and the case is really decided on the ground of laches, the beneficiary of the original decree having allowed an action at law to go to judgment and to be dispossessed.

In all these cases it would appear that the original decree was not final, being open to review, and with the exception of *Lawrence v. Berney*, (where laches was the turning point), there had been no judgment of the court but the decree had been taken by default or consent.

VI.

IF THE DECREE OF 1858 WAS NOT ADVERSARY BUT BY CONSENT, YET AS IT IS BASED ON A VALUABLE CONSIDERATION, NAMELY, THE RELEASE OF OTHER LANDS, IT CANNOT BE UPSET TODAY.

The predecessors of Mary H. Atcherley having received the benefit of the release of other lands from the claim, and having rested content with the decision for 40 years, cannot now withdraw that consent and set aside the decree.

VII.

THE DECISION IN KAPIOLANI ESTATE, LIMITED, V. ATCHERLEY IS A BINDING AND CONCLUSIVE ADJUDICATION ON MARY H. ATCHERLEY.

It is a decision of the highest court.

At that time no appeal lay to this court. The de-

cision was of the rights of the parties on the same facts now before this court in the case of 1903, where, by agreement, those facts were submitted to the Supreme Court for the purpose of determining whether the decision of 1858 was *res adjudicata* between the parties. The demurrer raised every ground claimed here, and the same points were made and the same decisions cited to that court as were cited in 1908. It was contended that the decree against Richard Armstrong is erroneous and did not entitle the plaintiff to the relief asked for, and the Lawrence Mfg. Co. case was relied on, the same point advanced by Mr. Bates in 1858. This point is referred to by all the judges. Judge Perry says: "The old decree is claimed by respondent to be erroneous, for the further reason that, upon the facts and the evidence adduced in that proceeding in 1858, the court erred in holding that Kinimaka, and after him his heirs, was a trustee of the legal title for the benefit of Kalakaua," and holds that under the circumstances, after a lapse of more than 40 years, it should not be re-examined. Chief Justice Frear, referring to the Lawrence Mfg. Co. case, and showing that the prior decree was not the consequence of consent and was complete, also holds that after this lapse of time it would be improper to go into the merits of the former decree, after the plaintiff and its predecessors have been in possession and enjoyed the benefits of the decree for more than 40 years. Judge Galbraith declines to go into the merits of the decree, but sus-

tains the demurrer on the ground of lack of service on the minors.

Instead of the "fundamental principle" of the present decision being "a principle of law not there alluded to," each of the judges alluded to it and decided it favorably to our contention.

Law of the case.

We contend that the decision of 1903 is the law of this case, since that decision was binding between the parties in that litigation, which is still pending between the original parties, and that this case is ruled by the law of that case, the parties having agreed to submit the question in that case to the court in this; otherwise, the result in this case would be that, while this proceeding is dismissed, the injunction suit would go to a hearing, the circuit court being bound by the opinion of 1903, a decree would be entered compelling Mary H. Atcherley to convey the title. The result would be that in that suit we would procure the same relief as we are seeking in this suit, excepting that we would not procure our title to be registered, which would be prevented by the lack of the very deed which we would obtain.

Stare decisis.

If the decision of 1903 is not the law of the case, then the question should be regarded as foreclosed on the ground of *stare decisis*.

Vail v. Arizona, 207 U. S. 201.

VIII.

THE DECISIONS OF JUDGE ROBERTSON AND CHIEF JUSTICE ALLEN IN 1858 AND THE DECISION OF THE SUPREME COURT IN 1903 HAVING LAID DOWN A RULE OF PROPERTY, LEWERS & COOKE, LIMITED, WERE ENTITLED TO RELY UPON IT IN MAKING A PURCHASE OF THE PROPERTY, AND THE HAWAIIAN COURT CANNOT DISREGARD ITS FORMER OPINION.

The Supreme Court of Hawaii, in the *Estate of Kaniu*, after the Land Commission Award, reciting the fact that Kalakaua brought proceedings immediately upon becoming of age to have the award declared a trust for him, held that it would admit the will of Kaniu to probate, which devised the property to Kalakaua. It further held, in 1858, that where the award had been procured by the guardian in his own name for property belonging to his ward, the court had jurisdiction and would compel a conveyance from his heirs. These decisions having been acquiesced in for 40 years, Mrs. Atcherley in 1897 purchased the legal title for \$50.

In 1903 the Supreme Court of Hawaii decided that a bill setting out the facts found by the court in this case, set out a good cause of action in favor of the Kapiolani Estate, the then owner of the Kalakaua title, to enjoin a suit in ejectment by Mrs. Atcherley and compel a conveyance of the legal title; holding

that the decree of 1858 was a valid adjudication between the parties. Upon this, Lewers & Cooke, on May 29, 1905, bought the equitable title for about \$35,000, which was its assessed value.

These decisions had become a rule of property, and Mary H. Atcherley relied on them in paying \$50 for the Kinimaka title in 1897, before the decision of 1903; and Lewers & Cooke, Limited, relied on all the decisions, including that of 1903, as declaring a rule of property, in paying \$35,000 for the Kalakaua title.

Kuhn v. Fairmont Coal Co., 215 U. S. 372.

A single decision of the Hawaiian Supreme Court has been held to establish a rule of property.

Kealoha v. Castle, 210 U. S. 148.

It is not only a rule of property, but is a rule of this particular property, which the purchaser had a right to rely on, and which is binding on every court until reversed.

Grignon v. Astor, 2 How. 343.

The Propeller Genesee Chief v. Fitzhugh, 12 How. 451, 458.

Henderson v. Griffith, 5 Pet. 151.

Minn. Min. Co. v. Nat. Min. Co., 3 Wall. 332.

Bibb v. Bibb, 79 Ala. 437.

Hihn v. Courtis, 31 Cal. 398.

Schori v. Stephens, 62 Ind. 441.

Frank v. Evansville & I. R. Co., 111 Ind. 132.

Dunklin County v. Chouteau, 120 Mo. 577.

White v. Kyle, 1 Serg. & R. 15.

Bright v. Esterly, 199 Pa. 88.

Henderson v. Rost, 11 La. Ann. 541.

Wilkins v. Chicago, St. L. & N. O. Ry. Co., 110 Tenn. 442.

Union Ry. Co. v. Chickasaw Cooperage Co., 116 Tenn. 598.

O'Rourke v. Clopper, 22 Tex. Civ. App. 377.

IX.

THE DECISIONS OF 1858 AND 1903 NECESSARILY CONSTRUED THE STATUTES DEFINING THE JURISDICTION OF THE LAND COURT AND OF THE SUPREME COURT IN 1858 AND HELD THAT THAT COURT HAD JURISDICTION. THESE DECISIONS BECAME A PART OF THE LAW, AND A SUBSEQUENT DECISION COULD NOT CHANGE THE RIGHTS OF THE PARTIES.

The only question passed upon by Chief Justice Allen was whether he was concluded by the decision of the Land Commissioners. He, therefore, necessarily construed the statutory powers of the Supreme Court in equity and the effect of the decree under the statutes constituting the Board of Land Commissioners.

Houston & T. C. R. Co. v. Texas, 177 U. S. 66.

Dunklin County v. Chouteau, ubi supra.

That construction the court, in 1903, held was conclusive upon the parties and could not now be overturned, after forty years of acquiescence. This was

a part of the law which entered into the conveyance by the Kapiolani Estate, Limited, to Lewers & Cooke, Limited, and which determined the validity of that conveyance and the rights of the parties under it.

There is nothing in the principle on which the rule rests which would limit it to a case of contract. Every person is presumed to know the law, and an innocent person who acts in accordance with the law as then declared is entitled to its protection.

State v. Comptoir Nat. D'Escompte De Paris,
51 La. Ann. 1272.

This is an equitable proceeding, and a court of equity ought to protect Lewers & Cooke, who have acquired rights relying upon the decisions sought to be overruled, paying \$35,000, in their innocence, as against Mrs. Atcherley, who acquired her rights while the decision which is here overruled was law, and who clearly believed in it, as she paid but \$50 for the title here sustained.

It is idle to say—as the Supreme Court of Hawaii does—that the question of the jurisdiction of the court is a new point. There is no distinction between the point that the Supreme Court in 1858 had no jurisdiction to declare a Land Commission Award held in trust for a ward whose guardian had obtained it fraudulently, and the point made by Mr. Bates in the case itself that the court had not the power, because it was concluded by the Land Commission Award. Nor is there any difference between the

point made by Mrs. Atcherley in this case that the Supreme Court in 1908 had no jurisdiction to enter the decree, and the point made by her in 1903 that it was error to enter the decree because the court in 1858 was concluded by the Land Commission Award.

Whatever doubt the Court of Hawaii had in this case about the power of the court in 1858, that decision declared the power of the court and construed the statutes which gave the Supreme Court jurisdiction and the statute which gave the Land Court jurisdiction. That construction, and the construction by the court in 1903, becomes a part of the law, whatever doubt the court now may have, so far as the rights acquired thereunder, they cannot be reversed.

“If a decision has been made upon solemn argument and mature deliberation, the presumption is in favor of its correctness, and the community have a right to regard it as a just declaration or exposition of the law, and to regulate their action and contracts by it.”

I Kent. Com. 476.

“A judicial construction of a statute becomes a part of it, and as to rights which accrue afterwards it should be adhered to for the protection of these rights. To devert them by a change of construction is to legislate retroactively. The constitutional barrier to legislation impairing the obligation of contracts applies also to decisions altering the law as previously expounded, so as to affect the obligations of existing contracts, made on the faith of the earlier adjudications.”

Suth. Stat. Constr., Sec. 319.

Rowan v. Reynolds, 5 How. 134.

Ohio L. Ins. & T. Co. v. Debolt, 16 How. 416.

Los Angeles v. Los Angeles City Water Co.,
177 U. S. 558.

Muhlker v. N. Y. & H. R. R. Co., 197 U. S. 544.

The rule is the same in regard to a conveyance as to any other contract. Its validity and effect is determined by the laws then in force.

Muhlker v. N. Y. & H. R. Co., ubi supra.

Stephenson v. Boody, 139 Ind. 66.

Haskett v. Maxey, 134 Ind. 182.

Levy v. Hitsche, 40 La. Ann. 508; 4 So. 476.

Fisher v. Lott, 110 S. W. 822.

Myers v. Boyd, 144 Ind. 449.

Nor is it material in this case that the change is by judicial decision and not by statute.

Loeb v. Trustees of Columbia Township, 179
U. S. 472.

The rule applies where the question involved is the jurisdiction of a court with reference to land.

Levy v. Hitsche, ubi supra.

Herndon v. Moore, 18 S. C. 355.

Hall v. Wells, 54 Miss. 301.

If the rule advanced by Professor Gray, and apparently approved by this court, that a decision until it is reversed makes the law of a jurisdiction as much as a statute unrepealed, then this decision was the law which fixed the rights of these parties.

Mr. Justice Holmes in *Kuhn v. Fairmont Coal Co.*, ubi supra.

But the case does not depend on this proposition. It comes within all rules suggested in *Kuhn v. Fairmont Coal Co.*, 215 U. S. 349. These are adjudications between the parties, or their predecessors, upon the title—adjudications involving the construction of statutes giving jurisdiction to the court of Hawaii, which the parties had a right to rely on as a rule of property.

We will not weary the court by prolonging the discussion upon this point, because of our strong conviction that, it having been found by the court twice in 1858 and admitted by the parties in open court in those cases that Kalakaua was equitably entitled to the property, unless the King had a right to take it back and give it through the Land Commission Award to Kinimaka, a point decided against the Kinimaka heirs in both decisions, and well settled, the court in 1858 had, and the court now has, jurisdiction in equity to declare Kinimaka and his heirs trustees for the holders of the equitable title.

Respectfully submitted,

WILLIAM R. CASTLE,
DAVID L. WITHINGTON,
W. A. GREENWELL,
ALFRED L. CASTLE,

For Appellant.

APPENDIX.

SECTION 2407. APPEALS. Appeals solely upon points of law shall be allowed from any final order, decision, judgment or decree of the court to the Supreme Court, except in cases in which any party shall appeal to the Circuit Court, whenever the party appealing shall file notice of his appeal within five days, and shall pay the costs accrued, and deposit a sufficient bond in the sum of fifty dollars, conditioned for the payment of the costs further to accrue, in case he is defeated in the appellate court, or money to the same amount, within ten days after the filing of the decision, judgment, order or decree appealed from.

Upon such appeal the record in the cause shall be sent to the Circuit Court. . . .
transmitted to the Supreme Court within the time and in the manner provided for appeals to the Circuit Court.

Section 2407, Revised Laws of Hawaii, amended April 5, 1907.

ACT CREATING BOARD OF COMMISSIONERS TO QUIET LAND TITLES.

(PASSED DECEMBER 10, 1845)

(Vol. I, Laws of Kamehameha III, p. 107)

SECTION 1. His Majesty shall appoint, through the Minister of the Interior, and upon consultation with the Privy Council, five commissioners, one of whom shall be the Attorney-General of this Kingdom, to be a board for the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any

landed property acquired anterior to the passage of this Act; the awards of which board, unless appealed from as hereinafter allowed, shall be binding upon the Minister of the Interior and upon the applicant.

SECTION 5. It shall be the special duty of said Board to advertise in the Polynesian newspaper, during the continuance of their sessions, the following public notice, viz.:

TO ALL CLAIMANTS OF LAND IN THE HAWAIIAN ISLANDS — The undersigned have been appointed by His Majesty the King, a board of commissioners to investigate and confirm or reject all claims to land arising previously to the _____ day of _____, 18____. Patents in fee simple, or leases for terms of years, will be issued to those entitled to the same, upon the report which we are authorized to make, by the testimony to be presented to us.

The board holds its stated meetings weekly at _____, in Honolulu, Island of Oahu, to hear the parties or their counsel, in defence of their claims; and is prepared, every day, to receive in writing, the claims and evidences of title which parties may have to offer, at the _____, Honolulu, between the hours of 9 o'clock A. M. and 3 o'clock P. M.

All persons are required to file with the board specifications of their claims to land, and to adduce the evidence upon which they claim title to any land in the Hawaiian Islands, before the expiration of two years from this date, or in default of so doing, they will after that time be forever barred of all right to recover the same, in the courts of justice.

Dated _____ day of _____, 18____.

SECTION 6. The said Board shall be in existence for the quieting of land titles during two years from the first publication of the notice above required, and shall have power to subpoena and compel the attendance of witnesses by discretionary fine; in like manner when in session for the hearing of arguments, to punish for contempt; and they shall

have power to administer oaths to witnesses, and to perpetuate testimony in any case depending before them, which, when so perpetuated, shall be valid evidence in any court of justice created by the Act to organize the judiciary.

SECTION 7. The decisions of said Board shall be in accordance with the principles established by the Civil Code of this Kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of absentees, tenancy and subtenancy—primogeniture and rights of adoption; which decisions being of a majority in number of said Board, shall be only subject to appeal to the Supreme Court, as prescribed in the Act to organize the judiciary, and when such appeal shall not have been taken, they shall be final.

SECTION 8. All claims to land, as against the Hawaiian Government, which are not presented to said Board within the time, at the place and in the manner prescribed in the notice required to be given in the fifth section of this article, shall be deemed to be invalid, and shall be forever barred in law, unless the claimant be absent from this Kingdom, and have no representative therein.

SECTION 9. The Minister of the Interior shall issue patents or leases to the claimants of land pursuant to the terms in which the said Board shall have confirmed their respective claims, upon being paid the fees of patenting or of leasing (as the case may be) prescribed in the third part of this Act, unless the party entitled to a lease shall prefer to compound with the said Minister as in the succeeding section allowed.

SECTION 13. The titles of all lands claimed of the Hawaiian Government anterior to the passage of this Act, upon being confirmed as aforesaid, in whole or in part, by the Board of Commissioners, shall be deemed to be forever settled, as awarded by said Board, unless appeal be taken to the Supreme Court, as already provided. And all claims rejected

by said Board, unless appeal be taken as aforesaid, shall be deemed to be forever barred and foreclosed, from the expiration of the time allowed for such appeal.

AN ACT REGULATING GUARDIANS AND WARDS.

(Laws of Kamehameha III, 1851, p. 63)

WHEREAS, by the common law of this kingdom guardians have, from time immemorial, possessed and exercise the absolute right to dispose of the real and personal estate of their wards, as might suit their own will, and whereas it is proper that the rights of guardians should be abridged and more clearly defined:

SECTION 16. Every guardian appointed under the provisions of this act, whether for a minor or any other person, shall pay all just debts due from the ward, out of his personal estate, is sufficient, and if not, out of his real estate, upon obtaining a license for the sale thereof, as hereinafter provided; he shall also settle the accounts of the ward, and demand, sue for, and receive all debts due to him, or may, with the approbation of any of the judges hereinbefore specified, compound for the same, and give a discharge to the debtor, upon receiving a fair and just dividend of his estate and effects, and he shall appear for and represent his ward, in all legal suits and proceedings, unless where another person is appointed for that purpose, as guardian or next friend.

SECTION 18. The guardian may join in, and assent to a partition of the real estate of the ward, either upon a petition for partition, or otherwise; and he may assign and set out dower in the said estate to any widow entitled thereto, and may appoint an appraiser of real estate on any execution either against or in favor of his ward.

JUDICIARY ACT OF MAY 26, 1853.

SECTION 2. Said Supreme Court shall have jurisdiction in all cases in law or equity, in all cases affecting ambassadors, other public ministers and consuls, and in all admiralty and maritime cases, whether the same be brought before it by original writ, by appeal or otherwise. It shall also have all the powers, and exercise all the jurisdiction belonging to either the Supreme or Superior Court, as at present constituted, in all cases, legal or equitable, civil or criminal.

SECTION 4. The Chief Justice of the Supreme Court shall be the Chancellor of the Kingdom, and shall have power at chambers to decree the foreclosure of mortgages, to grant divorces, to issue process in, and to hear and determine all probate matters, and all cases in bankruptcy, admiralty or equity, subject, however, to an appeal to the full Court. Moreover, the Chief Justice and two Associate Justices of the Supreme Court shall respectively have all the powers at chambers conferred by present laws upon the Chief Justice and Associate Justice of the Superior Court.

SECTION 5. The Supreme Court shall have the general superintendence of all courts of inferior jurisdiction, to prevent and correct errors and abuses therein, where no other remedy is expressly provided by law.

SECTION 7. Said Court shall have power to make and award all such judgments, decrees, orders and injunctions, to issue all such executions and other writs and processes, and to do all such other acts as may be necessary or proper to carry into full effect, all the powers, which are or may be given to it by the Constitution and laws of the Kingdom.

THIRD ACT KAMEHAMEHA III, 1847.

AN ACT TO ORGANIZE THE JUDICIARY DEPARTMENT OF THE HAWAIIAN ISLANDS.

(Vol. II, Chapter I, p. 3)

SECTION IV. The judgments and decisions of said courts, whether of record or not of record, unless appealed from, shall be final and binding upon the parties, and upon the subject-matter before them, and shall be, as to the causes so decided and unappealed from, the law of this kingdom, not to be disregarded, but to be fulfilled by the parties and enforced by mandate of the courts. Judgments and decisions passed and rendered by two-thirds of the Judges of the Supreme Court, shall be the absolute law of this kingdom, as effectually binding in the controversy or question submitted to them, as if passed by the Legislative Council of Nobles and Representatives, and sanctioned by the King in his executive capacity. Said judgments and decisions of the Supreme Court, shall be binding and compulsory upon all inferior courts, in all matters, causes, and controversies, and the parties litigant, plaintiff, defendant, prosecutor, or prosecuted, may cite them for that purpose, and they shall be taken notice of by said courts as such, in the administration of justice. The reasonings and analogies of the common law, and of the civil law, may in like manner be cited and adopted by any such court, so far as they are deemed to be founded in justice, and not at conflict with the laws and usages of this kingdom. The principles sustained by said courts when sanctioned by the supreme court, shall become incorporated with the common law of the Hawaiian Islands, and shall form an essential ingredient in the civil code: Provided always, that the Legislative Council of Nobles and Representatives, may by act sanctioned by His Majesty, and duly promulgated, correct, alter, or abrogate the principles of such abstract judgments and

decisions, in analogous cases afterwards to arise before said courts, or any of them.

Chapter IV, Article III (page 56)

SECTION VIII. The chief justice of the superior court, subject to the said court in *banco*, shall alone have power at chambers, to entertain bills in equity for the discovery of fraud, or of facts important to any complainant; and to enforce, by bill and decree in equity, hypothetical rights of property; to decree the foreclosure of mortgage liens upon landed or personal property; to entertain application for divorce not brought before the governors of the respective islands; to relax the strict rules of law applicable to any case, or to enlarge or restrain the meaning of the law, when the strict application thereof would work injustice to a party.

SECTION IX. In all such matters, applications and controversies, the said chief justice shall have all the equity powers incident at common law to the office of chancellor, and his rules, orders and decrees thereon, shall be subject to review and reversal, or amendment, by the said superior court upon the record in *banco*, and by the supreme court in like manner.

SECTION XVIII. They shall have full powers to compel executors, administrators and guardians to the performance of their trusts, and to require them to give account of their administration. They may in case of the moral unfitness or turpitude of the executor to any will appearing after letters testamentary granted, or in case of the death or surrender, or wrongful absconding of any such executor, upon satisfactory proof, appoint any suitable person applying or consenting, administrator *de bonis non administravit*, annexing to the letters of administration the testator's will, to be scrupulously followed by such administrator. And they may in like manner, and for the like causes, supersede any guardian appointed by will or by letters of guardianship.

CONSTITUTION OF JUNE 14, 1852.

ARTICLE 84. The judicial power shall extend to all cases in Law and Equity, arising under the Constitution, any law of this Kingdom, and treaties made, or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and consuls, and to all cases of admiralty and maritime jurisdiction.

ARTICLE 86. The Chief Justice of the Supreme Court shall be the Chancellor of the Kingdom; he shall be *ex-officio* President of the House of Nobles in all cases of impeachment unless when impeached himself; and exercise such jurisdiction in equity or other cases as the law may confer upon him, his decisions being subject, however, to the revision of the Supreme Court, on appeal.

INDEX.

	Page.
Statement of the Case.....	1
Argument.	
I. No Presumption Arises from Lapse of Time and Occupation that in 1858 Richard Armstrong Executed a Deed of this Land to Kalakaua..	7
II. The Supreme Court was not Bound to Follow Its Own Prior Decision in Kapiolani Estate Limited v. Atcherley as <i>Stare Decisis</i>	10
The Rule of "Law of the Case" did not Deprive the Supreme Court of Hawaii of power to decide that the decree of 1858 was erroneous....	10
The stipulation entered into between Kapiolani Estate Limited and Mary H. Atcherley in the Equity Suit, to withdraw the original pleadings and substitute others and reciting that both parties wished to have the question of <i>res adjudicata</i> settled before proceeding farther does not bind the parties here in any way, much less the Court	12
Appellant as a purchaser from Kapiolani Estate Ltd. bought <i>pendente lite</i> with notice of the pending litigation and the claims of Mary H. Atcherley and so has no right to rely on any rule of law, there being no final decree.....	13
III. The principle of <i>stare decisis</i> does not apply to the decree of 1858 for there is no decision.....	13
The decree of 1858 lays down no rule of property	13
No titles have been built up on this decree.....	14
As Appellant is in the position of one suing in equity to enforce the decree of 1858 against Appellee, the Court has a right to refuse to enforce that decree if found erroneous and not worthy of enforcement.....	14
Practice in the Courts of a Territory is based upon local statutes and procedure and the Supreme Court of the United States is not disposed to review the decision of the Territorial Supreme Court in such cases.....	17
The Decision of the Supreme Court of Hawaii was on points of law.....	17
Appellee is not guilty of <i>laches</i>	18
The decree of 1858 is not binding as a compromise and entered upon a valid consideration.....	19

INDEX (Continued).

Page.

IV. The subject matter is a local one, in which this court should give the greatest weight to the local decisions and uphold the decision of the local court if possible. The decision below should be regarded as if it were that of a State rather than a Territory.....	19
The Original Tenure of Hawaii from the time Kamehameha first established the monarchy to 1839 was feudal and a despotism. The King and each overlord under him had absolute ownership and control of the land and people under him.....	22
The Constitution of 1839 and laws down to establishment of the Board of Commissioners to quiet land titles in 1845 gave protection to interests in land, but those interests were still feudal and the remedy for wrongful dispossession of an heir was payment of damages, not return of the land.....	23
The awards of the Board of Commissioners to quiet land titles gave fee simple titles for the first time; did away with feudal tenure and settled forever all claims to lands arising prior to December 10, 1845.....	26
In the case of 1858 no fraud, actual or constructive, was pleaded or proved.....	42
The entire record negatives absolutely either actual fraud by Kinimaka or any possible presumption of constructive fraud arising out of fiduciary relations.....	44
Equity had no jurisdiction because Kalakaua had an adequate remedy at law.....	46
V. Moses Kapaakea Kinimaka was not a party to the Equity Case of 1858 and no estoppel of record results from it against Appellee.....	46
The case of Kalakaua v. Kinimaka (Record, pp. 218, 232-238) is a distinct case from that of Kalakaua v. Pai and Richard Armstrong Guardian (Record, pp. 220, 260-278), so no claim can rightly be made that the minors were before the Court as privies of Kinimaka.....	51
VI. The decree of 1858 is also not binding on Mary H. Atcherley because of lack of legal service of process on the minor Moses Kinimaka.....	52

IN THE
Supreme Court of the United States

OCTOBER TERM, 1911.

No. 69.

LEWERS AND COOKE, LIMITED, *Appellant*,

v.

MARY H. ATCHERLEY, *Appellee*.

BRIEF OF APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF
HAWAII.

STATEMENT OF THE CASE.

In 1843, four years after the first constitution of Hawaii had been granted by the King; when the Hawaiian government had progressed from its original despotism and had some written laws but tenure in land was still feudal and no one owned land in fee simple, one Kaniu, of Honolulu, died, leaving a foster son, David Kalakaua, and a husband Kinimaka. On her deathbed, in presence of her husband, the Governor of the Island of Oahu, and

others, she declared David Kalakaua her heir and asked Kinimaka to care for the property during Kalakaua's minority.

Appellee claims title from Kinimaka to the land in controversy. Appellant claims from David Kalakaua, resting its claim principally upon certain legal proceedings in 1858 and 1903 and estoppels claimed in various forms.

This is an appeal from a decree of the Supreme Court of Hawaii, that Lewers and Cooke, Limited, has no legal or equitable title to certain land in Honolulu. Lewers and Cooke, Limited, had brought suit in the Court of Land Registration of the territory to register title to a larger tract including that here in controversy, and Mary H. Atcherley appeared in that case as contestant. The first decree in the court of Land Registration was in favor of Lewers and Cooke, Limited. On appeal to the Supreme Court of Hawaii that decree was set aside on the ground that Lewers and Cooke, Limited, had no title to the land claimed by Mary H. Atcherley. The trial court then made a new decree dismissing the petition. On appeal a final decree was entered by the Supreme Court.

Mary H. Atcherley's chain of title is as follows:

In 1846, the Hawaiian government organized itself into a modern form of government by three elaborate acts and abolished the old feudal tenure of land and created a court entitled Board of Commissioners to Quiet Land Titles, which should make awards which should be final, and the foundation of fee simple titles in the kingdom. July 14, 1846, Kinimaka filed a claim for an award of three parcels of land, claiming one from Kaniu (his wife), and this property now in controversy from Liliha (Governess of Hawaii) (Record, pp. 308-310). The Board of Commissioners awarded him the land April 10, 1849.

Kinimaka died in 1857 devising the land to a daughter

Kaniu Kinimaka for life, after her death to David Leleo Kinimaka, a son, for his life, remainder to Moses Kinimaka, a son in fee simple.

In 1880 Kaniu made a deed of her interest to David Leleo Kinimaka. David Leleo Kinimaka died in 1884 and Kaniu Kinimaka in 1901. Mary H. Atcherley, a daughter of David Leleo Kinimaka, purchased the remainderman's interest in 1897 (Record, p. 223).

Lewers and Cooke, Limited, claim title from David Kalakaua who March 6, 1858, filed a petition for probate of an oral will of Kaniu, wife of Kinimaka. In this proceeding it was proved that Kaniu died in 1843 and on her deathbed gave all her property to David Kalakaua, her foster son and to Kinimaka as his guardian; that Kinimaka reported this will to the King and the premier at Lahaina on the Island of Maui (the then capital), that the premier reported in writing to the Governor of Oahu that the King had given all the property to Kinimaka himself. No reference is made in these probate proceedings to any awards by the Board of Commissioners of any land titles affecting property of Kaniu. The Court admitted the will to probate holding that an ancient oral will was valid on being reported to the King and that the King had not the power to annul the will of Kaniu and substitute Kinimaka as her heir (Record, pp. 249-251, 245-6).

July 19, 1858, Kalakaua filed a bill in equity against Pai (second wife of Kinimaka) and Richard Armstrong, guardian of his three children, alleging the probate, and that Kinimaka while acting as his guardian had wrongfully and fraudulently procured the award of four parcels of land in his own name that had been bequeathed to him by Kaniu, praying that a decree be made that Kinimaka procured the award for the use and benefit of Kalakaua and that R. B. Armstrong, guardian of the minor children

of Kinimaka, be ordered to convey to Kalakaua all the right, title and interest of the said children in said lands, and that Pai, widow of Kinimaka be ordered to convey all her right, title and interest (Record, pp. 260-262). Service was made on the attorney of Armstrong and on a member of the household of Pai, answer filed by the attorney and a hearing had.

The Secretary to the Land Commission was called and brought in what testimony had been preserved of that offered before the Land Commission on the petition which included this land and the two other parcels. This evidence only related to one of the three pieces, and this is not identified except that it is a parcel that came to Kinimaka from his wife Kaniu. The other two were evidently either awarded without evidence or on evidence not preserved in this record. (Record, pp. 272-3.)

Evidence of retainers was also put in (pp. 274-275) to show that some land was regarded as Kaniu's and David's. These witnesses do not distinguish between different parcels or apparently know that four different parcels of land were involved. The evidence of each refers to but one place.

C. Kanaina testified as to one of the Chief's lands "Onoulimaloo" that it had originally belonged to Kaniu, that in 1848 Kinimaka got that land because he appeared for her and her heirs and that he understood that land then to belong to David. (Record, p. 271.)

At this point the claim was raised Aug. 19, 1858, for the defense that Kalakaua was estopped by the award to Kinimaka (Record, p. 276).

Nov. 2, 1858, David Kalakaua filed a discontinuance as to all lands but two in consideration of certain sums of money paid by Kinimaka during his lifetime for his use and benefit, and on the same day the clerk signed and filed a document as follows:

"Supreme Court in Equity at Chambers, 2 Novr., 1858.
David Kalakaua,

vs.

Richard Armstrong, Guardian of Kaniu, David Leleo, &
Kinimaka, minor children of Kinimaka, Deceased.

Before Honorable E. H. Allen, Chief Justice:

The Court did order, adjudge and decree in this matter that Mr. Armstrong, as Guardian of Kaniu, David Leleo and Kinimaka, Minor children of Kinimaka, deceased, do convey to David Kalakaua, the plaintiff in this cause, the land named Omulimalo on the Island of Molokai and the first apana of land set forth in Royal Patent No. 1602 filed in this cause.

JNO. E. BARNARD,
Clerk Supreme Court."

(Record, pp. 277-278.)

Armstrong never made a deed.

Kalakaua went into possession of the land in controversy, possession passing from him to his wife Kapiolani, her nephew Jonah Kalaniana'ole and David Kawanana'koa and to Kapiolani Estate Limited which sold for value to Lewers and Cooke, Limited, May 27, 1905, by warranty deed.

In 1901, Mary H. Atcherley upon the death of the life tenant Kaniu brought suit in ejectment against Kapiolani Estate Limited. Kapiolani Estate Limited then brought a suit in equity against Mary H. Atcherley alleging the litigation of 1858 and praying that Mary H. Atcherley be declared to hold in trust and ordered to convey the legal title to Kapiolani Estate Limited. A demurrer was sustained by the Trial Court and overruled by the Supreme Court, answers filed.

Lewers and Cooke, Limited, after its purchase, began this action in the Court of Land Registration, while ejectment and equity suits were still pending and it and Mary H. Atcherley agreed to submit themselves to the jurisdic-

tion of the Court of land registration notwithstanding these pending cases.

The questions of law raised by the Assignment of Errors of Appellant fall logically into four groups.

I.

Whether Appellant has a legal title from a presumption that Richard Armstrong, guardian, executed a deed in accordance with the decree of 1858.

II.

Whether the decision of the Supreme Court of Hawaii in Kapiolani Estate Limited v. Atcherley in 1903 deprives it of power in this case to examine into the decree of 1858.

III.

Whether the Supreme Court of Hawaii in this case had power to declare the decree of 1858 erroneous.

IV.

Whether the decree of 1858 is erroneous and no ground of an equitable title in appellant.

Appellant's points of law will be discussed in this order and also two points raised by appellee in the Court below but not decided.

V.

The decree of 1858 is not binding on appellee because her grantor, Moses Kinimaka was not a party in that case.

VI.

The decree of 1858 is erroneous because rendered without service on Moses Kinimaka.

There are two sets of findings of fact in the record: one made by the Court of Land Registration after the first appeal had been decided and without any fresh hearing (Record, pp. 80-196) and one made by the Supreme Court of Hawaii (Record, pp. 216-332).

These are practically the same, but that made by the Supreme Court is the one contemplated by the statute (*Haus v. Victoria Copper Min. Co.*, 160 U. S., 303, 313) and all references in this brief are to the Supreme Court findings.

I.

NO PRESUMPTION ARISES FROM LAPSE OF TIME AND OCCUPATION THAT IN 1858 RICHARD ARMSTRONG EXECUTED A DEED OF THIS LAND TO KALAKAUA.

In general the policy of courts of law is to limit the presumption of grants to periods analogous to those of the statute of limitations in cases where the statute does not apply and the presumption arises from the possibility and likelihood that the legal owner would have interfered with the possession.

Ricard v. William, 7 Wheaton, 221, 227.

Fletcher v. Fuller, 120 U. S., 534, 550, 592.

In this case the statute does apply and there is nothing preventing the acquisition of title by adverse possession but the statute has not yet run. Moses Kinimaka, appellee's grantor, had as remainderman no right until 1901 to possession, so no presumption can arise from his failure to demand it.

Kinimaka died in 1857 and devised this land to Kaniu Kinimaka for her life; then to David Leleo Kinimaka for life; remainder to Moses Kinimaka in fee simple.

Kaniu Kinimaka conveyed her life estate to David Leleo Kinimaka in 1880 and died in 1901. In 1884 David Leleo Kinimaka died leaving several minor children including appellee. In 1897 Moses Kinimaka conveyed to appellee who brought suit in ejectment in 1901 at death of the life tenant Kaniu (Record, p. 224).

Kaniu Kinimaka at the time she sold to David Leleo Kinimaka had lost her life estate by adverse possession (Supreme Court decision, Record, p. 27). There was, therefore, no merger of estates or transfer of estate which would have given Mary Atcherley as one of the heirs of David Leleo Kinimaka in 1884 a right to possession, and, both by general law and the statutes of Hawaii, as purchaser from the remainderman she had no right to possession until death of Kaniu and the statute of limitations did not begin to run against her.

Moore v. Luce, 29 Penn. St., 260, 262.

Wells v. Prince, 9 Mass., 508.

Cole v. Grigsby, 35 S. W., 680, 689, 690.

Angell on Limitations, 371, 375.

Revised Laws of Hawaii Ch., 127 Statute of Limitations, §1990.

"In the construction of this chapter, the right to make an entry or commence an action, shall be deemed to have first accrued at the times respectively hereinafter mentioned, that is to say: * * *

Secondly. When he claims as heir or devisee of one who died seised, his right shall be deemed to have accrued at the time of such death, unless there is an estate by the curtesy or in dower, or some other estate intervening after the death of such ancestor or deviser, in which case his right shall be deemed to have accrued when such intermediate estate shall expire, or when it would have expired by its own limitation.

Thirdly. Where there is such an intermediate

estate, and in all other cases, where a party claims in remainder, or reversion, his right so far as it is affected by the limitation herein prescribed, shall be deemed to accrue when the intermediate or precedent estate would have expired by its own limitation, notwithstanding any forfeiture thereof, for which he might have entered at an earlier time."

That Richard Armstrong in 1858 loaned to David Kalakaua \$450.00 upon security of a mortgage of this land in which the premises are described as "granted to said D. Kalakaua by a decree of the Chief Justice of the Supreme Court" does not show that Armstrong as guardian had executed and delivered a deed but merely that he was ignorant of the nature of the decree. This was natural as he had no personal connection with the case. He was not served personally, did not sign the answer, and is not shown by the minutes to have ever been present in Court at any stage of the proceedings (Record, pp. 265, 269).

But if Richard Armstrong had given a deed it would not have passed the legal title for that was in Moses Kini-maka, not in Armstrong. Decrees in equity operate *in personam* and at common law courts of equity had no power to appoint commissioners to convey property of a defendant but could only effect a transfer by forcing the defendant to convey. The practice of deeds by commissioners has grown up throughout the United States by express statute.

Pomeroy's Equity Jurisprudence, Vol. 1, §134, 155, 170, 428-431; Vol. 4, §1317.

Pomeroy's Equitable Remedies, Vol. 1, §12.

Prewit v. Ashford, 90 Ala., 294.

The Hawaiian statute creating equity powers gave the courts the common law powers.

Third Act of Kamehameha III. An Act to Organize the Judiciary Department of the Hawaiian Islands. Ch. IV. Article III. Sec. IX.

"In all such matters, applications and controversies the said Chief Justice shall have all the equity powers incident at common law to the office of Chancellor."

There was no law expressly giving an equity court power to enforce a trust by a decree *in rem* or to appoint a commissioner to convey property of a defendant. It follows that the only way to enforce a trust against an infant was to give the plaintiff present possession and provide for a conveyance by the infant on his becoming of age.

Gay v. Parpart, 106 U. S., 679, 691.

II.

THE SUPREME COURT WAS NOT BOUND TO FOLLOW ITS OWN PRIOR DECISION IN KAPIOLANI ESTATE LIMITED V. ATCHERLEY AS *STARE DECISIS*.

"The rule of *stare decisis*, though one tending to consistency and uniformity of decision is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the Court which is again called upon to consider a question once decided."

Hertz v. Woodman, 218 U. S., 205, 212.

Moreover this case was decided on grounds not considered in Kapiolani Estate v. Atcherley (Record, p. 32, 71).

THE RULE OF "LAW OF THE CASE" DID NOT DEPRIVE THE SUPREME COURT OF HAWAII OF POWER TO DECIDE THAT THE DECREE OF 1858 WAS ERRONEOUS.

"It is said that the decree established the law of the case, but that phrase expresses only the practice of courts generally to refuse to reopen what has been decided, not a limit to their power."

King v. West Virginia, 216 U. S., 92, 100.

A ruling on a demurrer is not such a final adjudication that the Court may not reconsider its action and enter a contrary order nor decide the same matter differently when subsequently presented again in the same case.

31 Cyc., 350.

Hamilton v. Marks, 63 Mo., 167, 172.

Jungk v. Reed, 12 Utah, 292; 42 Pac., 292, 294.

Reeves v. Petty, 44 Tex., 249, 254.

Meyers v. Dittmar, 47 Tex., 373.

Norton v. Knapp, 64 Ia., 112, 115.

Hastings v. Foxworthy, 45 Neb., 676, 697.

Penn. Co. v. Platt, 47 Ohio St., 366, 379.

The decision in Kapiolani Estate Limited v. Atcherley being on demurrer and not a final decree, every question of law involved in that decision may be brought to this Court by appeal from the final decision in that case.

Great Western Telegraph Co. v. Burnham, 162 U. S., 339, 341.

Appellant, who is responsible for this case, should not complain of the consideration now of these questions.

This is a distinct case from Kapiolani Estate Limited v. Atcherley and the appellant was not a party to that case but is a purchaser from a party and has chosen to bring a separate action. Therefore, there is no law of the case.

THE STIPULATION ENTERED INTO BETWEEN KAPIOLANI ESTATE LIMITED AND MARY H. ATCHERLEY IN THE EQUITY SUIT, TO WITHDRAW THE ORIGINAL PLEADINGS AND SUBSTITUTE OTHERS AND RECITING THAT BOTH PARTIES WISHED TO HAVE THE QUESTION OF *RES ADJUDICATA* SETTLED BEFORE PROCEEDING FARTHER DOES NOT BIND THE PARTIES HERE IN ANY WAY, MUCH LESS THE COURT.

It is merely a stipulation to withdraw pleadings and substitute others. It contains no agreement to abide by any decision; no agreement not to appeal to the Supreme Court of the United States. If it were binding on the parties the Court could of its own initiative correct error.

Such as it was, that stipulation has been superseded by another made between Lewers & Cooke Ltd. and Mary H. Atcherley. The Supreme Court of Hawaii has found as fact that "The parties agreed to submit themselves to the jurisdiction of the Court of Land Registration notwithstanding an equity suit and suit in ejectment pending in the Circuit Court."

Record, p. 225.

In the light of this agreement it lies ill in the mouth of appellant to claim an estoppel by a stipulation in a pending case. In electing not to push that equity case to a final decision but to bring another suit in the Court of Land Registration, appellant has submitted itself to this case and should not deny the power of the Court to consider all questions involved as though the pending cases were non-existent.

APPELLANT AS A PURCHASER FROM KAPIOLANI ESTATE LTD. BOUGHT *PENDENTE LITE* WITH NOTICE OF THE PENDING LITIGATION AND THE CLAIMS OF MARY H. ATCHERLEY AND SO HAS NO RIGHT TO RELY ON ANY RULE OF LAW, THERE BEING NO FINAL DECREE.

Mellen v. Moline Malleable Iron Works, 131 U. S., 352, 370.

Gay v. Parpart, 106 U. S., 679, 696.

It bought May 29, 1905 (Rec., p. 225), after the passage of the law providing appeals to the U. S. Supreme Court in cases involving over \$5,000.00 (33 U. S. Stat., 1035, Sec. 3), and since there was no final judgment, knew that the pending litigation was subject to appeal to this Court.

Wm. W. Bierce Ltd. v. Waterhouse, 219 U. S., 320, 337.

III.

THE PRINCIPLE OF STARE DECISIS DOES NOT APPLY TO THE DECREE OF 1858 FOR THERE IS NO DECISION.

The decree is a simple order to Richard Armstrong, guardian to convey (Rec., p. 278). No principle of law is announced that a later Court could follow.

THE DECREE OF 1858 LAYS DOWN NO RULE OF PROPERTY.

It does not declare the minors trustees. If it did the decision would affect as well all property Kinimaka had obtained from his wife Kaniu. Kalakaua had discontinued as to this (Rec., p. 277).

NO TITLES HAVE BEEN BUILT UP ON THIS DECREE.

In the chain of title from Kalakaua to appellant is shown no purchaser for value except appellant who bought *pendente lite* (Rec., pp. 71, 222).

The decree is a personal one not carried out and suggests to every purchaser a defect in title rather than a good title.

AS APPELLANT IS IN THE POSITION OF ONE SUING IN EQUITY TO ENFORCE THE DECREE OF 1858 AGAINST APPELLEE, THE COURT HAD A RIGHT TO REFUSE TO ENFORCE THAT DECREE IF FOUND ERRONEOUS AND NOT WORTHY OF ENFORCEMENT.

The old decree on its face shows no equity in appellant. It does not declare the minors Kaniu, David Leleo and Moses Kinimaka to be trustees or find that their father Kinimaka committed either actual or constructive fraud; does not find that Kaniu and not Kinimaka had original feudal tenants' rights or that Kaniu's oral will had been admitted to probate and does not even order specifically a conveyance of the interest of the minors. In order to extract an equitable interest from the decree to enforce against Mary H. Atcherley, it is necessary to look into the rest of the record of the case and find what it is about; to read the pleadings and evidence. When upon doing this it appears erroneous it should not be enforced.

This is a principle as old as that of *res adjudicata* and estoppel by record.

"I do not understand the rule to be that this Court is bound to carry into execution an erroneous decree. On the contrary I apprehend that when a party comes into this Court asking for the benefit of a former decree, he must be prepared to show that such decree was right."

O'Connell v. MacNamara, 3 D. & W., 411.

"Where a party returns to a Court of Chancery to obtain its aid in executing a former decree, it is at the risk of opening up such decree as respects the relief to be granted on the new bill and if the Court be of opinion that it was erroneous it may refuse to execute it."

Lawrence Mfg. Co. v. Janesville Cotton Mills,
138 U. S., 552, 561.

See also:

O'Brien v. Wheelock, 184 U. S., 450, 483.

Gay v. Parpart, 106 U. S., 679, 699.

West v. Skip, 1 Vesey, 240, 245.

Lancaster v. Snow, 184 Ill., 534, 537.

Wadhams v. Gay, 73 Ill., 415, 430.

Title & Trust Co. v. Shallcross, 147 Penn. St., 485,
490.

Wheeler v. Eldred, 121 Calif., 29.

Hamilton v. Houghton, 2 Bligh, 169, 193.

Johnson v. Northey, Finch's Prec. in Chancery, 134.

Lawrence v. Berney, 2 Rep. in Ch., 127.

Appellant has tried to distinguish the circumstances of these cases from the one at bar and claims that in each case there was no decision on the merits and that in 1858 there was.

But the case of 1858 is not shown to be on the merits. The indications are that there was no actual decision. Petitioner had put in his case or part of it and defendants raised a point of extreme moment, that of the finality of a judgment of the Board of Commissioners to Quiet Land Titles (Record, p. 275-6). Then follows the written acknowledgment of Kalakaua that Kinimaka had spent money for him and a discontinuance as to some lands (Record, p. 277) and the decree on the same day (Record, p. 278).

There is no written decision. It is unlikely if the judge actually considered the points of law as to the finality of a land commission award that he would have failed to write a decision and unlikely that he would have come to a different conclusion than that of the numerous decisions since on the question, all upholding the Board of Commissioners. It was too important a question to dismiss lightly. It is also unlikely that after his cries of fraud Kalakaua should suddenly be filled with gratitude for what Kinimaka had done for him. It is unlikely that the defendants should rest the case without putting on any defense. Nothing was put on to prove the claim from Liliha, governess of Oahu; none of the evidence to disprove actual fraud and show that Kinimaka had shown the will to the King who had rejected it and given the land to him. The form of the clerk's entry of the decree unaccompanied by any other minutes showing presence of counsel, etc., and avoiding any findings of fact or law that might throw doubt upon the title of other land of Kinimaka indicates that the decree was by consent. Pai is not mentioned in the decree though one of the defendants. She is similarly omitted from the title of the discontinuance, an indication that these two documents were drawn by the same hand without any decision by the chancellor. The partial discontinuance is dated in the courtroom on the same day as the decree and was doubtless a moving cause of a consent agreement. If a consent agreement, the guardian gave up what in the light of the Hawaiian statutes belonged to the wards.

All this may be considered by the Supreme Court of Hawaii in deciding whether the old decree should be enforced. When that Court as in this case has decided that it has the power to go behind the decree and has done it and declared the old decree erroneous, the matter is analo-

gous to the question of *stare decisis* and the question before the Supreme Court of the United States is whether the decree of 1858 was erroneous, not whether the Supreme Court of Hawaii was right or wrong in examining it.

PRACTICE IN THE COURTS OF A TERRITORY IS BASED UPON LOCAL STATUTES AND PROCEDURE AND THE SUPREME COURT OF THE UNITED STATES IS NOT DISPOSED TO REVIEW THE DECISION OF THE TERRITORIAL SUPREME COURT IN SUCH CASES.

Santa Fe County v. Color, 215 U. S., 296, 307.

Sweeney v. Lomme, 22 Wall., 208, 213.

Copper Queen Mining Co. v. Ariz. Board, 206 U. S., 474, 479.

Fox v. Haarstick, 156 U. S., 674, 679.

Maytin v. Vela, 216 U. S., 598, 602.

Armijo v. Armijo, 181 U. S., 558, 561.

English v. Arizona, 214 U. S., 359, 363.

It follows that as the Supreme Court of Hawaii has decided that it has the power to decide that a decree of 1858 is erroneous and should not be enforced in equity and that the question is properly before it on appeal, this Court will not review either proposition.

THE DECISION OF THE SUPREME COURT OF HAWAII WAS ON POINTS OF LAW.

There is no controversy on the facts. The opinions of the Supreme Court of Hawaii do not review and reverse any findings of fact of the Trial Court. The only questions involved are pure questions of law.

The first decree of the Court of Land Registration (Record, pp. 10-17) makes no reference to any discretionary

power in it as to whether the decree of 1858 should be enforced, but was on the theory that it was bound by the case of Kapiolani Estate Limited v. Atcherley.

APPELLEE IS NOT GUILTY OF LACHES.

The general rule in a court of equity is that equity follows the statute of limitations and that a person not barred by the statute is not barred in equity. Often equity allows a much longer time than the statute of limitations without laches. As has been shown above the statute has not run against appellee.

The recognized excuse of a party in possession for laches is that while enjoying possession a flaw in the title does not harm him. All reasons for excusing a party in possession for not bringing a suit to remove a flaw in the title apply to Moses Kinimaka and Mary H. Atcherley. They have not only not been deprived of any enjoyment of the land, seeing that until expiration of the first life estate in 1901 they had no right to such enjoyment, but there was no flaw in their title. Their legal title was good and quite sufficient to enable them to regain possession in an action of ejectment at close of the life estate if the life tenant Kapiolani Estate Limited should refuse to vacate. The decree of 1858 as worded could not harm the remainderman. It made no finding as to the title and did not direct the remainderman to do anything. It affected only Richard Armstrong, long dead. There was no need for Moses Kinimaka to take the initiative. The burden of action was on Kalakaua and his privies. They waited forty-three years. In a case for specific performance this would surely be laches, and if there is any laches it is that of appellant, not appellee. The appellant is in the position of the moving party asking equitable relief, not the appellee.

THE DECREE OF 1858 IS NOT BINDING AS A COMPROMISE AND ENTERED UPON A VALID CONSIDERATION.

The discontinuance (Record, p. 277) was in consideration of money received.

The argument *supra* on the questions of presumption of grant and laches apply to the question of estoppel by acquiescence for over forty years to a consent decree. The remainderman's consent would begin at the death of the life tenant. Appellee began an action of ejectment the same year. (Record, p. 223, printed page 130.)

The *indicia* that the decree was by consent only affect the case in that they dispose the court to give no weight to the decree as expressing the opinion of the chancellor.

IV.

The decisions of the Supreme Court of Hawaii in this case are based on constructions of statutes that created fee simple titles in land for the first time and relate to the fundamental real estate law of Hawaii and refer back to the time when Hawaii was an independent nation. The ground of the decision is that the awarding of a land commission award to Kinimaka in 1849 by the Board of Commissioners to Quiet Land Titles on his application of 1846 (Record, pp. 218, 308, 295) was a final adjudication of all rights in that land, legal and equitable, gave a fee simple title for the first time, and that thereafter no court could re-examine the title before that time so as to affect the title awarded by the Board of Commissioners.

THE SUBJECT MATTER IS A LOCAL ONE, IN WHICH THIS COURT SHOULD GIVE THE GREATEST WEIGHT TO THE LOCAL DECISIONS AND UPHOLD THE DECISION OF THE LOCAL COURT IF POSSIBLE. THE DECISION BELOW

SHOULD BE REGARDED AS IF IT WERE THAT
OF A STATE RATHER THAN A TERRITORY.

The organic act of the Territory of Hawaii created a federal court distinct from the territorial courts and provided 31 U. S. Stat. c. 339, Sec. 86.

"The laws of the United States, relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several States shall govern in such matters and proceedings as between the courts of the United States and the courts of the Territory of Hawaii."

This carries with it the principles of construction of State statutes. The amendment of 1905 giving an appeal in all cases involving \$5,000 does not repeal the former section and should not be construed in cases appealed under it as changing the weight to be given to local decisions on matters of local law.

"It (the State) has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subject to its rules concerning the holding, the transfer, liability to obligations, private or public, and the modes of establishing titles thereto. * * *

The well being of every community requires that the title to real estate therein be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern or vested in the general government; it remains with the State; and as this duty is one of the State, the manner of discharging it must be determined by the State, and no proceeding which it provides can be declared invalid, unless it conflict with some special inhibitions of the Constitution or against natural justice."

Arndt v. Griggs, 134 U. S., 316, 321.

"As it is indisputable that the general welfare of society is involved in the security of the titles to real estate and in the public registry of such titles, it is obvious that the power to legislate as to such subjects inheres in the very nature of government. This being true, it follows that government possesses the power to remedy the confusion and uncertainty as to registered titles arising from a disaster like that described by the court below."

(Holding that residents might be bound by service by publication in a suit concerning land after San Francisco fire.)

American Land Co. v. Zeiss, 219 U. S., 47, 60.

"It may be said generally that wherever the decisions of the State courts relate to some law of a local character which may have become established by those courts, or has always been a part of the law of the State, that the decisions upon the subject are usually conclusive, and always entitled to the highest respect of the Federal courts."

Bucher v. Cheshire R. Co., 125 U. S., 555, 584;

Kuhn v. Fairmont Coal Co., 215 U. S., 349, 359;

Boston Chamber of Commerce v. Boston, 217 U. S., 189, 194.

Maiorano v. Baltimore & Ohio R. R. Co., 213 U. S., 268, 272.

"Even in the case of a law adopted by an organized Territory of the United States at a time when it was subject to the control of Congress, the rule is that we will lean towards the interpretation of a local statute adopted by the local court.

"Here the law in question was passed while Hawaii was an independent government, and its meaning was declared by the court of last resort of that government, and, as we have said, that law as thus construed was given recognition by the organic act."

Kealoa v. Castle, 149, 153.

THE ORIGINAL TENURE OF HAWAII FROM THE TIME KANEHAMEHA FIRST ESTABLISHED THE MONARCHY TO 1839 WAS FEUDAL AND A DESPOTISM. THE KING AND EACH OVERLORD UNDER HIM HAD ABSOLUTE OWNERSHIP AND CONTROL OF THE LAND AND PEOPLE UNDER HIM.

"When the islands were conquered by Kamehameha I, he followed the example of his predecessors and divided out the lands among his principal warrior chiefs, retaining however, a portion in his hands, to be cultivated by his own immediate servants or attendants. Each principal chief divided his own lands anew, and gave them out to an inferior order of chiefs, or persons of rank, by whom they were subdivided again and again; after passing through the hands of four, five or six persons, from the King down to the lowest class of tenants. * * *

"The tenures were in one sense feudal, but they were not military, for the claims of the superior on the inferior were mainly either for produce of the land or for labor, military service being rarely or never required of the lower orders. All persons possessing landed property, whether superior landlords, tenants or subtenants, owed and paid to the King not only a land tax, which he assessed at pleasure, but also service which was called for at discretion, on all the grades from the highest down. * * * They owed obedience at all times. * * *

"The same rights which the King possessed over the superior landlords and all over them, the several grades of landlords possessed over their inferiors. * * * The superior always had the power at pleasure to dispossess his inferior, but it was not considered just and right to do it without cause, and dispossession did not often take place, except on the decease of one of the landlords, when changes were often numerous, and the rights of heirs and tenants comparatively

disregarded, for the purpose of favoring a new class of persons."

Principles adopted by Board of Commissioners to Quiet Land Titles in 1846. Revised Laws of Hawaii, pp. 1164-6.

(Enacted as law in 1846. Revised Laws of Hawaii, p. 1179.)

"Formerly, if the landlord became dissatisfied, he at once dispossessed his tenant, even without cause, and then gave his land to whomsoever asked for it.

"Formerly, if the King wished for the property of any man, he took it without reward; even seized it by force, or took a portion only, just in accordance with his choice, and no man could refuse him. The same was true of every chief, and even the landlords treated their tenants thus."

Laws of 1842 (of Hawaii), Ch. LIV.

THE CONSTITUTION OF 1839 AND LAWS DOWN TO ESTABLISHMENT OF THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES IN 1845 GAVE PROTECTION TO INTERESTS IN LAND, BUT THOSE INTERESTS WERE STILL FEUDAL AND THE REMEDY FOR WRONGFUL DISPOSSESSION OF AN HEIR WAS PAYMENT OF DAMAGES, NOT RETURN OF THE LAND.

Constitution granted by Kamehameha III, 1839, and printed October 8, 1840:

"Protection is hereby secured to the persons of all the people, together with their lands, their building lots, and all their property, while they conform to the laws of the kingdom, and nothing whatever shall be taken from any individual except by express provision of the laws."

"The origin of the present government, and system of polity, is as follows: Kamehameha I, was the founder of the kingdom, and to him belonged all the

land from one end of the Islands to the other, though it was not his own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property. Wherefore, there was not formerly, and is not now any person who could or can convey away the smallest portion of land without the consent of the one who had, or has the direction of the kingdom.

"These are the persons who have had the direction of it from that time down: Kamehameha II, Kaahumanu I, and at the present time Kamehameha III. These persons have had the direction of the kingdom down to the present time, and all documents written by them, and no others are the documents of the kingdom."

"The prerogatives of the King are as follows:

"He shall be the chief judge of the Supreme Court, and it shall be his duty to execute the laws of the land, also all decrees and treaties with other countries, all however in accordance with the laws."

First Laws of Hawaii, published in 1842, and called "Old Laws" or "Blue Laws."

Ch. III, Sec. 8.

"It is furthermore recommended that if a landlord perceive a considerable portion of his land to be unoccupied, or uncultivated and yet is suitable for cultivation, but is in possession of a single man, that the landlord divide out that land equally between all his tenants. And if they are unable to cultivate the whole, then the landlord may take possession of what remains for himself, and seek new tenants at his discretion.

Ch. III, Sec. 11.

"Ye landlords, to whom lands are given in charge, no longer rule your tenants in ignorance, lest the tax officers being enlightened in the principles of this book nullify your title as landlord, and we give the lands to

those who are ready to aid the feeble portions of the community. The ignorant shall receive their proper reward, poverty, and the lands shall be given to other lords."

Ch. III, Sec. 14.

"If any one spoken of in this law seize the land of lawful heirs, which is protected by this law, the punishment shall be as follows: two-thirds of the income of said land obtained by the new landlord in a year shall be delivered to the heir, and it shall be thus delivered each year for four successive years, and then the land shall belong to the new landlord.

"From this time forth, the King and his Premier must be informed of all bequests of land, and whatever relates to the heirs. But if the deceased have no heir at all then his land and all his property shall be the King's."

Ch. XXI, Sec. 8.

"When the parent dies, then the child is the heir, if there be any child living. The parent during his life time may sell his personal estate to whomsoever he pleases. But the land and all fixed property on the land shall descend to the child. If he have many children, they all shall inherit it together. Though if the parent while he is living and in sound mind, make a written will, he may bequeath his land to whom he pleases. When he dies the heir shall exhibit the will to the King, and if the Supreme Judges perceive that there was a real fault in the will, they shall correct it, lest those to whom the property justly belongs should be left destitute, and those possess the property to whom it does not belong."

Ch. XLVIII.

"Whoever contracts a debt, he alone shall be liable for the debt, and his property alone shall go for the payment of it. And lest there should be mistaken opinions as to what kind of property may be seized for the payment of debts, it is hereby clearly proclaimed that lands and fixed property upon them can never be sold at auction, neither can they be perma-

nently transferred. They can not even be leased for years without the consent of the King and Premier. This kind of property therefore can never be seized for debt, for the Government has never relinquished its right to the soil. But nevertheless, if a man have no personal estate, the land and fixed property upon it may be sold at auction on this condition, that no person can be the purchaser except a native born citizen; and the right of him who purchases in this manner shall be the same as the right of other natives to their lands."

Ch. LIV.

"1. If a farm be seen to be grown over with weeds and food upon it, and yet a good farm for cultivation, in such a case, the tenant shall be dispossessed, though he shall not be dispossessed without a trial, nor at the mere suggestion of his landlord. The criminal person shall be dispossessed, whether it be the landlord or the tenant.

"2. Furthermore, forbearance shall be exercised for one year more, and then if the idleness of the people continues, it shall be the duty of the tax-officer whenever he sees a man sitting idle, or doing nothing on the free days of the people, to take that man and set him at work for the Government and he shall work till night.

"The landlords also may do the same with the tenants of their lands when they are idle. This law is passed on account of the idleness of the people on their own free days. While they are at work for themselves, they shall not be set to work for others."

THE AWARDS OF THE BOARD OF COMMISSIONERS TO QUIET LAND TITLES GAVE FEE SIMPLE TITLES FOR THE FIRST TIME; DID AWAY WITH FEUDAL TENURE AND SETTLED FOREVER ALL CLAIMS TO LANDS ARISING PRIOR TO DEC. 10, 1845.

An Act to Organize the Executive Departments of the Hawaiian Islands. Part I, Ch. VII, Art. IV. Of the Board of Commissioners to Quiet Land Titles.

Sec. I. (Revised Laws of Hawaii, p. 1160).

"His Majesty shall appoint * * * Five commissioners, one of whom shall be the attorney general of this kingdom, to be a board for the investigation and final ascertainment or rejection of all claims of private individuals, whether natives or foreigners, to any landed property acquired anterior to the passage of this act (Dec. 10, 1845); the awards of which board, unless appealed from as hereinafter allowed, shall be binding upon the minister of the interior and upon applicant."

Sec. II. (Revised Laws of Hawaii, p. 1161).

"The said commissioners shall, before acting, take and subscribe an oath to be administered to them by the minister of the interior, in the following form:

"We and each of us do solemnly swear that we will carefully and impartially investigate all claims to land submitted to us by private parties against the government of the Hawaiian Islands; and that we will equitably adjudge upon the title, tenure, duration and quantity thereof, according to the terms of article fourth of the seventh chapter of the first part of an act entitled "An Act to organize the executive departments of the Hawaiian Islands."'"

Sec. V.

"It shall be the special duty of said board to advertise in the Polynesian newspaper, during the continuance of their sessions the following public notice, viz.:

"To all Claimants of Land in the Hawaiian Islands. —The undersigned have been appointed by His Majesty the king, a board of commissioners to investigate and confirm or reject all claims to land arising previously to the * * * day of * * * 18.. Patents in fee simple, or leases for terms of years, will be issued to those entitled to the same, upon the report which we are authorized to make, by the testimony to be presented to us.

"The board holds its stated meetings weekly at * * * in Honolulu, island of Oahu, to hear the parties or their counsel, in defense of their claims; and is prepared, every day, to receive in writing, the

claims and evidences of title which parties may have to offer, at the * * * in Honolulu, between the hours of 9 o'clock A. M. and 3 o'clock P. M.

"All persons are required to file with the board specifications of their claims to land, and to adduce the evidence upon which they claim title to any land in the Hawaiian Islands, before the expiration of two years from this date, or in default of so doing, they will after that time be forever barred of all right to recover the same, in the courts of justice.

"Dated * * * day of * * * 18..."

Sec. VII. (Revised Laws, p. 1163).

"The decisions of said board shall be in accordance with the principles established by the civil code of this kingdom in regard to prescription, occupancy, fixtures, native usages in regard to landed tenures, water privileges and rights of piscary, the rights of women, the rights of absentees, tenancy and subtenancy, primogeniture and rights of adoption; which decisions being of a majority in number of said board, shall be only subject to appeal to the supreme court, as prescribed in the act to organize the judiciary, and when such appeal shall not have been taken, they shall be final."

Sec. VIII. (Revised Laws, p. 1163).

"All claims to land, as against the Hawaiian government, which are not presented to said board within the time, at the place and in the manner prescribed in the notice required to be given in the fifth section of this article, shall be deemed to be invalid, and shall be forever barred in law, unless the claimant be absent from this kingdom, and have no representative therein."

Sec. XIII. (Revised Laws, p. 1164).

"The titles of all lands claimed of the Hawaiian government anterior to the passage of this act, upon being confirmed as aforesaid, in whole or in part by the board of commissioners, shall be deemed to be forever settled, as awarded by said board, unless ap-

peal be taken to the supreme court, as already provided. And all claims rejected by said board, unless appeal be taken as aforesaid, shall be deemed to be forever barred and foreclosed, from the expiration of the time allowed for such appeal."

Principles adopted by the Board of Commissioners to Quiet Land Titles August 20, 1846, approved by the legislature October 20, 1846 (Revised Laws of Hawaii, p. 1179), and published in Laws of 1847, p. 81 :

Revised Laws of Hawaii, p. 1168.

"It being therefore fully established that there are but three classes of persons having vested rights in the land—1st, the government, 2nd, the landlord, and 3rd, the tenant, it next becomes necessary to ascertain the proportional rights of each. * * * Ancient practice, according to testimony seems to have awarded to the tenant less than justice and equity would demand, and to have given to the King more than the permanent good of his subjects would allow. If the King be disposed voluntarily to yield to the tenant a portion of what practice has given to himself he most assuredly has a right to do it; and should the King allow to the landlord one third, to the tenant one third, and retain one third himself, he, according to the uniform opinion of the witnesses, would injure no one unless himself; * * *

"It is altogether probable that since the act of 1839, a few individuals may have acquired allodial ownership of landed property, either by purchase or by voluntary grant on the part of the King. Such ownership must be proved or it cannot be acknowledged; for the King, representing the government, having formerly been the sole owner of all the soil, he must be considered to be so still, unless proof be rendered to the contrary; and even possession of ever so long standing cannot be proof, any thing more than that which is specified above as belonging to the landlord, or to the landlord and tenant, as the case may be."

Revised Laws of Hawaii, p. 1168.

"Mere building lots were never bestowed by the King or lords for the purpose of being given out to tenants, as was uniformly the case with lands suitable for cultivation. It follows, therefore, that (with some exceptions, which in all cases must be proved) in relation to building lots, there is no third class of persons having the rights of lords over tenants."

Revised Laws of Hawaii, pp. 1168-9.

"Although the above facts and principles are most perfectly clear and unquestionable, yet great evils have existed down to the present moment, owing mainly to the circumstance that several different classes of persons had undivided rights in the same lands, and each class was very liable to claim more than the due proportions. In such cases, lords, or persons of superior power or rank have generally been the oppressors, and perhaps there are none of those classes, from the throne down, who have not sometimes taken advantage of the powerless in this respect. Neither the laws of 1839 nor of 1840 were found adequate to protect the inferior lords and tenants, for although the violators of law, of every rank were liable to its penalty, yet it was so contrary to ancient usage, to execute the law on the powerful for the protection of the weak, that the latter often suffered, and it was found necessary to adopt a new system for ascertaining rights, and new measures for protecting those rights when ascertained, and to accomplish this object the Land Commission was formed.

"The decisions of an executive board would be so far surrenders of the Chief Executive Magistrate, who has approved the powers conferred upon that Board, as to be an authorization from him to adjust all the past tenures in the manner most equitable, and if abstractly just, power to alienate for him any rights, which he as King could surrender in regard to these lands. The whole power of the King to confer and convey lands to which private equitable claim now at-

taches, is reposed in the commission. What is the nature and extent of that power which the King has bestowed upon this board? It can be no other than his private or feudatory right as an individual participant in the ownership, not his sovereign prerogatives as head of the nation. * * *

Revised Laws of Hawaii, p. 1171.

"The Hawaiian rulers have learned by experience, that regard must be had to the immutable law of property, in things real, as lands, and in things personal, as chattels; that the well being of their country must essentially depend upon the proper development of their internal resources, of which land is the principal; and that in order to its proper cultivation and improvement, the holder must have some stake in it more solid than the bare permission to evolve his daily bread from an article to which he and his children can lay no intrinsic claim. They perceive by contact with foreign nations that such is their uniform practice, and that the rules of right under that practice are contended for, understood and likely to be applied, in regard to the lands otherwise held at their hands by a tenancy incomprehensible to the foreigner. They are desirous to conform themselves in the main to such a civilized state of things now that they have come to be a nation in the understanding of older and more enlightened governments.

"Such we the commissioners understand to have been the reason of the distinction in the Constitution of 1840, between government lands and private lands of the King, and such we now understand to be the spirit of article 4th, chapter 7th, of the first part of the Act to organize the executive departments of the Hawaiian Islands, founded upon the Law Report of May 21, 1845, in which it was recommended to prepare His Majesty's government to consort in some measures with the recognizing powers. In consequence, it was enacted that the King is to appoint five commissioners for quieting land titles, and thus con-

fer upon them all his private and public power over the corporate property in lands claimed by private parties, which in the nature of things he can delegate."

Revised Laws, p. 1175.

"A wide latitude is thus left to the Commissioners, who must, in passing upon the merits of each claim, first elicit from creditable witnesses, the fact or history of each; and thus assort or reconcile those facts to the provisions of the civil code, whenever there is a principle in past legislation applicable to the point under consideration; but when no such principle exists, they may judicially declare one, in accordance with ancient usage and not at conflict with any existing law, nor at variance with the facts, and altogether equitable and liberal."

Revised Laws, p. 1176.

"The following benefits will result from these investigations and awards:—

"1st. They will separate the rights of the King and Government, hitherto blended, and leave the owner, whether in fee, or for life, or for years, to the free agency and independent proprietorship of his lands as confirmed."

Revised Laws, p. 1177.

"2nd. The patents or leases given to claimants are for certain fixed and ascertained extents or dimensions of land. This must prevent after litigation in regard to boundaries. All parties having been cited before awarding, there can be no counter claims to the same piece of land after award, except by a party who has presented his claims to the Board.

"The patents and leases are recorded in duplicate, in the Department of the Interior. This will enable the foundation of every one's right to be known to the Government and inquiring parties. No pretended ownership can exist without the means of undeceiving the public in regard to them. Subsequent purchasers and mortgagees need not be in ignorance of prior defects in the title, or of prior incumbrances."

"The undersigned deem the foregoing prefatory remarks and explanations necessary to a clear understanding of the awards upon which they are about to enter, and indispensable to which awards, it is necessary to lay down the following general principles, to which they have arrived by critical study of the civil code, and careful examination of numerous witnesses; * * *

"1st. For the purposes of this Board in all cases where the land has been obtained from the King or his authorized agent without a written voucher, anterior to the 7th of June, 1839, the Board will inquire simply into the history of the derivation; and if the land claimed has been continuously occupied, built upon, or otherwise improved since that time, without molestation, the Board will, in case no contests exist between private claimants, infer a freehold less than allodial.

"2nd. In all such cases as above specified, when there are counter claims to the piece of land, the Board will confine their inquiry to which of the claimants has the freehold, less than allodial.

"3rd. In all cases where the land has been obtained from the King or his authorized agent, or from any governor, chief, or pretended proprietor, subsequent to the 7th of June, 1839, the Board will strictly inquire into the right of the King, or chief, or landlord, to make such disposition of the land; and will confirm or reject, according to the right of such donor, grantor, or lessor, regardless of consideration, occupancy or after improvement."

In organizing the judiciary departments with courts that had full equity powers, care was taken not to impair the plenary jurisdiction of the Board of Commissioners to Quiet Land Titles.

"Provided always, that nothing herein contained, shall be so construed as to interfere with the rights

and jurisdiction of the Board of Commissioners to Quiet Land Titles."

Third Act of Kamehameha III. An Act to organize the Judiciary Department of the Hawaiian Islands, Ch. I, Sec. III, p. 4.

These statutes created the Board of Commissioners to Quiet Land Titles as a court of exclusive jurisdiction over claims to land with extraordinary powers. It had equity jurisdiction, could create principles of law where none existed to fit a case. All suits were *in rem* and defendants were summoned by publication without being named. The court makes reference to former wrongs on tenants in its declaration of principles and makes it clear that its decisions shall be final. It clearly had power to consider whether a failure of the King to approve the will of Kaniu and his giving the land to Kinimaka was unauthorized or not. As infants were bound by the service by publication, Kalakaua was duly served as a defendant to the claim of Kinimaka and bound by the adjudication.

This service by publication may not seem sufficient to us in these days, but the task before the government was a herculean one, to examine and settle titles to all land in the kingdom; and the attempt was being made to do it in two years. It was more important that the work be completed and titles be made certain than that all past wrongs be righted.

In cases like that of the San Francisco fire this court has held that minors who were resident in the jurisdiction and might have been personally served with process were bound by service by publication when unknown to the court and an effort had been made to find all claimants.

American Land Co. v. Zeiss, 219 U. S., 47, *supra*.

The equitable doctrine of constructive trusts does not make every one a trustee who holds a legal title wrongfully obtained, but follows certain principles grown up in Anglo-Saxon jurisprudence. The title that "exists in conscience though there be none at law" does not include that taken from infants who have been deprived of land through negligence of their guardian or without notice, if forms of law have been complied with and a title obtained by adverse or by lying testimony is good in equity.

In considering whether there is an implied exception to the finality of an award by the Board of Commissioners to Quiet Land Titles the State of the law at that time should be considered. In the constitution of 1839 and the laws published in 1842 small space is given to fraud and equity jurisprudence. The tenure was feudal and based on labor. One who did not work was liable to lose his land. An infant was a loss to the overlord. It was of advantage to have a sturdy tenant rather than a weak one. Thus, the wrong of taking the land from an heir was punished by penalty rather than returning the land to the heir. Taking the land from an infant devisee by the widower of the tenant at the suggestion of the King would be less of a wrong.

While it is true that an equity court is a court of general jurisdiction and has jurisdiction over trusts and frauds, still where the law has explicitly given exclusive jurisdiction over a certain subject matter to a particular court, the court of equity has no jurisdiction over that particular subject matter and in this case the very statute that first created the equity court provided that its jurisdiction should not interfere with that of the Board of Commissioners to Quiet Land Titles.

As the court below said: "If this court, therefore, shall enforce the decree of 1858, or by registering the title of the

petitioner, treat the decree as enforceable, it will be the first time in the judicial history of Hawaii that a land commission award shall have been set aside upon any pretext whatever."

Awards have been held conclusive against every form of attack heretofore made on them. Claims of fraud, false testimony, infancy and even the admission of the king that a party had a right to an award have been of no avail.

"Kekiekie was one of those tenants who had duly entered his claim at the Land Commission, and subsequently in 1850 received his award and patent, that consequently the plaintiff's title was good against all the world."

Kekiekie v. Dennis, 1 Hawaii, 70 (side page 43).

In a case where it was claimed fraud had been practiced on the Board of Commissioners the court said:

"The Land Commission may have decided wrong, but if so, Gill or Kalua, both of whom had notice of the award, could have appealed to the Supreme Court, agreeably to the statute in such case made and provided. In that court they could have shown fraud, want of title, or anything else affecting the case; but it cannot be done here, under the circumstances. If we are to go into these cases anew, treating the awards of the Land Commission and the Supreme Court as nothing, then there is no security for any man's real estate—no rest for his title—and the whole kingdom will be afloat."

Kukiiahu v. Gill, 1 Hawaii, 91 (side page 55).

"The record of the Land Commission was admitted for the purpose of corroborating the evidence of error in the record, or error in the transcript," "not for the purpose of reviewing the decision of the Commission."
"The Court regard that as final."

"They neglected to take the opinion of the Supreme Court, which they could have had on their appeal."

Bishop v. Namakalaa, 2 Hawaii, 238, 240.

"The Court regard a Land Commission award as final."

Keelikolani v. Robinson, 2 Hawaii, 514, 539.

"The Land Commission with the powers of a Court of Record was competent to judge of its own authority, and whatever it did was final, unless reversed or modified by the Supreme Court upon appeal."

Ibid., p. 551.

"This mahele was the basis of a title. It was one of the conditions, however, of the mahele, that the title should be confirmed by the award of the Board of Commissioners. This Board was a Court of Record and here was adjudication, of which all parties in interest were obliged to take notice. And the date of adverse possession must be from the date of the award."

Kanaina v. Long, 3 Hawaii, 332, 335.

"But as against the government, a grant cannot be presumed from long possession, in view of the law which required claimants to land to present their claims to the Land Commission for confirmation or rejection."

Kahoomana v. Min. of Interior, 3 Hawaii, 635, 640.

"When appointed administrator of the estate of his wife Kaunuohua on the 13th of March, 1852, there was an award in his favor for the lands in the complaint described, bearing date September 17, 1851. This was equivalent to a judgment in his favor.

"The plaintiff's counsel, however, argues that there was not an adjudication in favor of Moehonua at all

because he was not a claimant before the Land Commission, and no evidence was offered in his favor. The bill alleges that Kaunuohua filed a petition in her lifetime praying that her title in said lands be confirmed by an award; that after her death said award 6450 was issued on her said petition. It is not stated that any new proof was taken after her death, and yet the situation of the property was changed. We are not to assume after this lapse of time that the Land Commission had no authority for issuing the award they actually did issue. It was undoubtedly an award in favor of Moehonua. The failure to record evidence to sustain it does not vitiate it, although if the question were opened it would be provable against it."

Kalakaua v. Keaweamahi, 4 Hawaii, 579.

Bill in equity to declare a trust.

"The law in this case respecting the examination of proceedings before the Land Commission has been placed by this Court in the cases of Kukiiahu v. Gill, 1 Haw., 34, and Bishop v. Namakalaa, 2 Haw., 233, on a foundation which cannot be disturbed. Every year which passes increases the force of the reason which demands that the adjudications of the Land Commission be not now re-examined."

Kaai v. Mahuka, 5 Hawaii, 354.

"In evidence before Land Commission is sentence, 'Claimant admits his brother Kaai to have equal rights.'

"It is urged that the Land Commission was a court of competent jurisdiction, and that the evidence upon which this judgment was based cannot be introduced to controvert their judgment. Soon after the dissolution of this Commission, the Supreme Court admitted the evidence taken before the Commission to show that the award as recorded was not the same as agreed upon by the Commission, and that the clerk had made an error in recording the judgment of the Commission.

"I cannot go any farther than this. During the twenty-five years that have elapsed since the date of that decision, all the members of the Commission have died, and the reasons grow stronger from day to day why the awards of the Land Commission should be treated as final."

Ibid., p. 356.

"The Mahele itself does not give a title. It is a division, and of great value because, if confirmed by the Board of Land Commission a complete title is obtained. But it was open to examination, and if the evidence was satisfactory that the Konohiki was entitled to the land according to the principles which governed that Board of Land Commission their award gave a complete title. By the Mahele, His Majesty the King consented that Pahoa should have the land subject to the award of the Land Commission.

"It appears by the whole course of legislation that an award of the Board of Land Commission was necessary to perfect the title until, by the law of 1860 the Minister of the Interior was authorized to grant awards.

"In my view, as Pahoa neglected to perfect his title before the Board of Land Commission, but suffered his claim to be barred, the legal title remained in the Government."

Kenoa v. Meek, 6 Hawaii 63, 67.

"But the Land Commission was authorized by law to investigate, confirm, or reject all claims to land arising previously to the tenth day of December, 1845, and as the will in this case vested the property at the date of the death of the testator (the 7th of June, 1845) the action of this commission in awarding the lands as mentioned above without the entail to the survivors is conclusive against the right to prove a will now which would divert the property differently than awarded.

"Their action was a judgment of a Court of com-

petent authority upon a matter within its jurisdiction, it being a claim for land arising previously to December 10, 1845.

"But the case of Estate of Kaniu, 2 Haw. 82 is referred to by the counsel for the petitioner. In this case Justice Robertson admitted a verbal will to probate made in 1843, and although the land the testator had had been awarded to Kinimaka, and not to the devisee. I cannot believe that the attention of the learned Justice was called to this point, or he would not have thus practically set aside an award of the Land Commission of which he was a member."

Estate of Kekauluohi, 6 Haw., 172, 178-9.

"There is a time in the history of every nation not formed by colonization, when, as it emerges from barbarism into civilization, titles to land may be said to have a beginning by positive institution of the people of such nation."

"The commission was authorized to consider possession of land acquired by oral gift of Kamehameha I, or one of his high chiefs, as sufficient evidence of title to authorize an award therefor to the claimant. This we must consider as the foundation of all titles to land in this Kingdom, except such as come from the King, to any part of his reserved lands, and excepting also the lists of Government and Fort lands reserved.

"This construction put upon the statute, that a failure to present a claim within the prescribed time absolutely barred the claimant, by the Legislative power of the Kingdom, the King and the Nobles and the Representatives, and uniformly concurred in and acted upon by successive Governments under many reigns following, and to this day, undisturbed by any judicial decisions, we are not at liberty to disregard.

"The statute therefore deprived Lot Kamehameha (on his failure to present his claim to the Commission) of what? Not of this land, for he had no title to it, but only of his right to present a claim for it, which was all the interest he had. * * *

"The doctrine of any inherent equity creating an exception as to any disability, where the statute of limitation creates none, has been long, and I believe uniformly exploded. General words in the statute must receive a general construction; and if there be no express exception, the Court can create none."

* * *

"This view is decisive of this case. The statute made no exception in favor of infants, and we can make none."

Thurston v. Bishop, 7 Hawaii, 421, 428.

None of the cases as to equity jurisdiction cited by appellant are in point as in none of them was there such a tribunal as the Board of Commissioners to Quiet Land Titles created before the creation of courts of equity or with such powers.

In an equity case involving a judgment of a commissioner to settle claims to land under Mexican land grants brought to declare defendants trustees and compel a conveyance of the legal title this court said:

"Suppose that is so (i. e., that fraud is proved), still it is insisted by the appellants that the decree should be reversed because the decree of the commissioners, as they contend, was final and conclusive between the original claimants. Unquestionably it is a general rule that when jurisdiction is delegated to a tribunal over a subject matter, and its exercise is confined to their discretion, the decision of the matter, in the absence of fraud, is in general valid and conclusive. Even fraud will not in every case open the judgment or decree to review where the proceeding is not a direct one, but it is not important to enter much into that field of inquiry, as the 15th section of the act provides that the final decrees rendered by the commissioners or by the District or Supreme Court of the United States or any

patent to be issued under the act, shall be conclusive between the United States and the said claimants only, and shall not affect the interests of third persons."

Meader v. Norton, 11 Wall., 442, 457.

The court derived the right in equity to declare a trust in an award of the land commissioner from the express exception in the statute. The strong implication is that if the statute had been like the Hawaiian one the award would have been held final.

IN THE CASE OF 1858 NO FRAUD, ACTUAL OR CONSTRUCTIVE, WAS PLEADED OR PROVED.

General allegations of fraud are insufficient—

Greenameyer v. Coats, 212 U. S., 434, 444;

United States v. Arredondo, 6 Peters, 691, 716,

and the facts set out and those proved do not in connection with the laws of the times show fraud.

The fraud rests primarily upon the probate in 1858 of the will of Kaniu. No other probate is alleged. There is no statement in the petition of Kalakaua that the oral will was reported to the King and no real fault found in it by the Supreme Judges. No acts by Kinimaka preventing such report are pleaded.

The evidence in the probate proceedings show that the probate was a setting aside of a decision of the King, the chief justice in 1843, against its probate.

The governor of the Island of Oahu (where the land lies) testified (Record, p. 251) that he wrote to the premier at Lahaina, the capital, informing her of Kaniu's oral will and that Kinimaka went personally to Lahaina to report it (in accordance with the Laws of 1842, Ch. III,

Sec. 14 and Ch. XXI, Sec. 8), and that he received a letter from the premier afterwards informing him that the King had given all the property to Kinimaka himself. When he met the premier he informed her that it was not in accordance with the will of Kaniu, and she replied, "Well, the King had done it?"

This amounts to a formal report of the premier of the Kingdom to the governor of Oahu that the King had refused probate of a will. The King was chief justice of the Supreme Court (Constitution of 1840, *supra*), and the supreme judges had power to correct wills in which they perceived a real fault (Laws of 1842, Ch. XXI, Sec. 3, *supra*.)

The court in its decision admitting the will to probate held that an oral will was valid without the approval of the King. The decision virtually sets aside the King's judgment that there was a real fault as erroneous.

Kinimaka might, in 1843, have appealed from the King to the Supreme Judges sitting *in banco* on behalf of Kalakaua perhaps. The procedure of those early days is not defined in any printed laws. But his failure to do so was not fraud, and not doing so he acquired a vested right upon the award of the land commission.

In the proceedings in probate there is no mention of any land commission award, either in petition for probate, evidence, decision, judgment or elsewhere in the record. (Record, pp. 239-259.) The fact that the Board of Commissioners to Quiet Land Titles had adjudicated the title to this land was not considered by the court.

So far as this probate decision may be construed as setting aside any land commission award it has been overruled.

Estate of Kekauluohi, 6 Hawaii, 172, 178-179.

But probate of a will does not determine the legal effect of the will on any property or that the testator owns any property.

Black on Judgments, §635.

It follows from the citations *supra* as to the finality of land commission awards and also the provision in Laws of 1842, Ch. III, Sec. 14, *supra*, that one who wrongfully dispossesses an heir shall own the land upon payment of two-thirds the income for four years (a quasi eminent domain), that the probate of this will after the award to Kinimaka did not affect any real estate that Kaniu may have owned that may have been awarded to Kinimaka.

As the only fraud alleged by Kalakaua rested entirely upon this probate, his whole case falls with it.

THE ENTIRE RECORD NEGATIVES ABSOLUTELY EITHER ACTUAL FRAUD BY KINIMAKA OR ANY POSSIBLE PRESUMPTION OF CONSTRUCTIVE FRAUD ARISING OUT OF FIDUCIARY RELATIONS.

He did nothing secretly. He reported the oral will in the presence of many chiefs (Record, pp. 251, 271); signing the Mahele or partition book in which he as owner gave up interests as chief in many lands and received a release from the King and was recognized as owner (Record, pp. 303-4); was a public act, and also made in presence of one of the witnesses to the oral will (Record, p. 254). His application to the Board for an award was a public act, and the application was published, so that all these many chiefs who had heard of the will, all acquaintances and relatives of Kalakaua would know it.

The King's objection to the will may have been wrong as decided by the judge that admitted the will to probate,

but it is inconceivable that Kinimaka in 1843 or 1848 could have doubted the King's right or been acting in anything but good faith. How was he in 1848 to guess that in 1857 a judge would say that a rejection by the King counted for naught and that when he reported the will to the King it would remain in force, whatever the King said. This was contrary to the feudal ideas.

The King has always been supreme over Hawaiian law. Though a King might limit himself voluntarily in a constitution, yet he could at any time legally abrogate the whole constitution. Thus the constitutions of 1852, 1864 and 1887, each in turn abrogated preceding ones, and were the act of the sovereign alone, not amendments made in accordance with the preceding constitution. In 1852 the sovereign refers to advice and consent of the Nobles and Representatives, and in 1887 to himself as the representative of the people, by them thereunto duly authorized, but in 1864 there is no such reference. That constitution was "Granted by His Majesty Kamehameha V, by the Grace of God, King of the Hawaiian Islands, on the Twentieth Day of August, A. D. 1864."

Kinimaka's application for an award (Record, pp. 308-310) shows that he did in fact claim to be heir of Kaniu, for one lot is claimed through her, but the one involved in this case is from Liliha (governess of the Island of Oahu).

This indicates an honest claim from Liliha. If fraudulent he would have either claimed all from Kaniu or manufactured false claims for all.

The record in Kalakaua's equity suit shows that six years passed after Kaniu's death before the award (Record, pp. 260, 295), and thirteen years before the suit in equity and that Kinimaka had paid out money for Kalakaua (Record, p. 277). The implication is that Kalakaua had received

two-thirds of the income for four years, and that Kinimaka had lawfully acquired Kalakaua's rights by the eminent domain provisions of Laws of 1842, Ch. 3, Sec. 14, *supra*. There is nothing in the pleadings or evidence to contradict this and for this reason fraud is not shown.

EQUITY HAD NO JURISDICTION BECAUSE KALAKAUA HAD AN ADEQUATE REMEDY AT LAW.

A suit to recover two-thirds of the income of the land for four years with interest would give him all he was entitled to under the laws prior to the award.

V.

MOSES KAPAAKEA KINIMAKA WAS NOT A PARTY TO THE EQUITY CASE OF 1858, AND NO ESTOPPEL OF RECORD RESULTS FROM IT AGAINST APPELLEE.

The first requisite of an estoppel by record is that the person estopped must be a party or a privy.

1 Black Judgments, Sec. 219.

23 Cyc., 1237.

Parker v. Spencer, 61 Tex., 155, 161.

George v. Holt, 9 Hawaii, 47.

Mossman v. Govt., 10 Hawaii, 421.

The suit in which the decree of 1858 was rendered was against Richard Armstrong the guardian of Moses Kapaahea Kinimaka, not against the minor himself.

The petition (Record, p. 262) is not entitled, but the prayer is that "Pai and the Guardian of the said children may be summoned."

The summons (Record, p. 265) commanded the marshal to "summon Pai (w) and Richard Armstrong (Guardian of Kaniu, David Leleo and Kinimaka Defendants to be and appear before the Honorable Elisha H. Allen."

The answer (Record, p. 267) is entitled, parties being reversed, "PAI & RICHARD ARMSTRONG, Guardians of Kaniu, David Leleo & Kinimaka, Minors vs. DAVID KALAKAUA" and is signed

"PAI
RICHARD ARMSTRONG,
Guardian of Kaniu, David Leleo, Kinimaka,
Minors
By ASHER B. BATES, Their Solicitor."
(Record, p. 269.)

The clerk's minutes (Record, p. 270) are headed:
"DAVID KALAKAUA

vs.

RICHARD ARMSTRONG, Guardian of Kaniu, David Leleo and Kinimaka."

The document filed by the plaintiff discontinuing as to some land (Record, p. 277) and the entry of decree (Record, p. 278) are headed:

DAVID KALAKAUA

vs.

RICHARD ARMSTRONG, Guardian of Kaniu, David Leleo & Kinimaka, Minor Children of Kinimaka, Deceased."

The rule is that a decree recites the names of the several parties to the cause who should have the same titles in the decree they have in the bill.

5 Enc. of Pl. and Pr., 1036, 1064.

"The title to the property of the ward does not pass to the guardian. * * * His position is that

of an agent or attorney, not that of an assignee or trustee. * * * The general rule that the ward is to be made a party in suits which concern his title is clear and well settled."

Lombard vs. Morse, 155 Mass., 137.

"Any decree obtained against a guardian in a suit in which the ward was not joined, would not be conclusive upon him nor enforced against him upon a subsequent bill founded only on such decree against his guardian."

Este v. Strong, 2 O., 401, 406.

"This is a bill in equity against the respondent as guardian of Edward Wakefield, a minor. It seeks the enforcement of a trust * * * and to compel a conveyance to the plaintiff of real estate the legal title to which was in the minor by descent. The minor is not made a party. * * * The infant not being made a party the bill must be dismissed."

Wakefield v. Marr, guardian, 65 Me., 341, 342.

"The bill is filed by Harris as guardian, to compel the conveyance of a town lot to his ward. Authorities are hardly required to show that, by the well established rules of chancery law, the bill should have been filed in the name of the ward, by his guardian or next friend. But it is argued that this rule has been changed by the statute, which reads: 'Guardians by virtue of their office as such, shall be allowed in all cases to prosecute and defend for their wards.' While this section may give the control of the proceedings to the guardian, it makes no change as to the parties to the suit. As formerly, the proceeding must still be conducted in the name of the parties really interested, as much as if they were adults. Only by making them parties could they be bound by the adjudication."

Hoar v. Harris, 11 Ill., 24, 25.

"It is the infant, and not the next friend, who is the real and proper party. The next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but resembles an attorney, or a guardian *ad litem*, by whom a suit is brought or defended in behalf of another. The suit must be brought in the name of the infant, and not in that of the next friend. *Crandall v. Slaid*, 11 Met. 288; *Guild v. Cranston*, 8 Cush., 506."

Morgan v. Potter, 157 U. S., 195, 198.

"This principle has also been adopted by the Supreme Court of Hawaii.

"The statute is (Compiled Laws, p. 444): 'The guardian shall appear for and represent his ward in all legal suits and proceedings, unless another person is appointed for that purpose, as guardian or next friend.'

"In the case at bar, a guardian for the minor had been appointed by the probate court. How, then, should the suit be brought? The purpose of it was to collect rent due for use of the minor's land. It was the suit of the minor, and not that of the guardian. But the minor cannot make a contract with an attorney to bring a suit, and cannot personally bring a suit; therefore, he must act through some one that is his guardian, if he have one, or by some one specially appointed by the court. The suit is nevertheless that of the minor.

"Analogous to this is a suit where the suitor is represented by an attorney in fact.

"All the forms in the books on pleadings correspond with this view. See Chitty's Practical Forms, Chap. 4, 'Actions by and against infants.' 'If the infant be plaintiff the process will be in his name, and not in the name of the guardian or *prochein amy*.'"

Meek v. Aswan, 7 Hawaii, 750.

Woerner American Law of Guardianship, §21, p. 64.

"There is little or no difference between the func-

tions of a next friend and that of a guardian *ad litem*, save that one of these names is usually given when they represent one, and the other side of the litigation; both are officers of the court; they are a species of attorney, whose duty it is to bring the rights of the infant to the notice of the court."

Ibid., p. 67.

"The appointment of a guardian *ad litem* cannot be properly made until after the infant is brought into court by the regular service of process."

Ibid., §22, p. 69.

"Neither the next friend, nor the guardian *ad litem* is a party to the suit; it is carried on in the name of the infant in either case."

See also:

Williams v. Cleaveland, 76 Conn., 426, 431.

Bryant v. Livermore, 20 Minn., 313, 342.

1 Beach Mod. Eq. Pr., §48, Note 1.

These principles have never been overruled in Hawaii but in Kapiolani Estate Ltd. v. Atcherley (Record, pp. 311-322, 14 Hawaii, 651), Judge Perry refused to follow them to their logical conclusion of no estoppel, on the ground that a different practice had been followed in many instances (Record, p. 319), citing six cases at *nisi prius*, and held that *stare decisis* forbade the overruling of those decisions. Judge Frear held that the question was one of error, not jurisdiction, and not whether Meek v. Aswan, *supra*, should be followed or the matter was *stare decisis*. He drew no distinction between the question of parties of record and that of service.

These opinions being on different grounds in a case in which no final decree has yet been entered do not establish

a territorial decision on local practice which this court should follow.

Judge Perry's opinion is illogical. If the doctrine of Meek v. Aswan is correct there can be no estoppel of record. Decisions of inferior courts do not establish any rule of *stare decisis* when contrary to the principle of a Supreme Court case that stands unreversed. The fact that a remainderman bringing suit as soon as his right accrues is in a similar position as to *laches* as a minor who brings suit at once on coming of age, was entirely ignored.

Judge Frear ignored the question of parties of record and treated the issue as one of service only and collateral attack and overlooked the fact that plaintiff and not Mrs. Atcherley, was taking the initiative.

Both judges acted as though Mrs. Atcherley was guilty of *laches* and plaintiff should have the credit of long undisturbed possession.

THE CASE OF KALAKAUA V. KINIMAKA (RECORD, PP. 218, 232-238) IS A DISTINCT CASE FROM THAT OF KALAKAUA V. PAI AND RICHARD ARMSTRONG GUARDIAN (RECORD, PP. 220, 260-278) SO NO CLAIM CAN RIGHTLY BE MADE THAT THE MINORS WERE BEFORE THE COURT AS PRIVIES OF KINIMAKA.

This earlier case concerns eleven pieces of land (Record, p. 233), not mentioned in the second, and the second concerns one, a kalopatch in Kaaleo, Oahu (Record, p. 220), not mentioned in the first. Kalakaua's equity is derived in the first from an oral will and approval by the king; in the second suit from a will probated in 1857, no approval by the king being pleaded.

A suggestion of the death of Kinimaka was made (Rec-

ord, p. 237), with a prayer that the minors be made parties and a guardian *ad litem* appointed, but this suggestion was never acted upon.

To revive a suit an order of court is necessary.

18 Enc. of Pl. & Pr., 1110 j.

10 Enc. of Pl. & Pr., 614.

1 Beach Mod. Eq. Pr., §488, p. 506.

Day v. Potter, 9 Paige Ch. (N. Y.), 645, 646.

Pickering v. Walcott, 1 Ind., 262, 263.

Aldrich v. Hassenger, 12 Hawaii, 10.

Service of either the summons or the order of revivor was necessary to bring the new parties before the court.

1 Beach Mod. Eq. Pr., §487.

18 Enc. of Pl. & Pr., 1108, 1109.

10 Enc. of Pl. & Pr., 615.

VI.

THE DECREE OF 1858 IS ALSO NOT BINDING ON MARY H. ATCHERLEY BECAUSE OF LACK OF LEGAL SERVICE OF PROCESS ON THE MINOR MOSES KINIMAKA.

The statute as to service was as follows:

"Vol. II Statute Laws of Kamehameha III, Third Act of Kamehameha. An Act to Organize the Judiciary Department of the Hawaiian Islands. Ch. IV. Art. I, Sec. III.

"Every summons issued under the seal of a court of record shall be served by the marshal or his deputy upon the defendant, by the delivery to him of a certified copy thereof, and of the plaintiff's petition, to which petition shall always be annexed a literal copy of the voucher upon which it is predicated (if any

there be), or in case the defendant cannot be found, by leaving such certified copy with some agent or person transacting the business of the defendant, or at the defendant's last place of residence, with some member of his family of suitable age."

And in suits *in rem* and *quasi in rem* this service was required and also service by publication.

Ibid. Sec. XX.

"All applications to either of the courts of record for the foreclosure of any mortgage of real property, or of any hypothecation or other maritime lien upon any vessel, domestic or foreign, or for the enforcement of the rights of material men, or for damage in cases of collision, or for the enforcement of rights in action between the master and crew of any foreign vessel *ex delicto*; which right of action arose beyond the jurisdiction of this kingdom; all applications for the abatement of nuisances, public or private, for the annulment of charters and other corporate rights; for restraint or prohibition in the exercise thereof; for proclamation by *scire facias*; for sequestration of property upon legal or equitable grounds; for divorces and separations other than those cognizable before the governors; for the affiliation of bastards; for the partition and division of real property; for the admeasurement of dower in real property; or for relief in cases of insolvency, bankruptcy or embarrassment; shall be by sworn petition addressed to one of the judges of a court having jurisdiction thereof. * * *

"When process is issued in such case, it shall be served by delivery of copy of the petition and of the judge's citation to the defendants, or in case they cannot be found by leaving such copy with some one upon the premises involved in the controversy, or upon the vessel libeled for foreclosure or attached for payment of a maritime lien or liability, and as soon after such service as may be, the officer charged with the execution of the mandate, shall in the discretion of the court

publish in the Polynesian newspaper for such period as the court may deem equitable, a notice of such action or proceeding, or of such libel, attachment, intended foreclosure, or sale upon hypothecation, or maritime lien, and inviting all persons interested to show cause against it on or before the day assigned for the hearing."

The return of service shows service on R. Armstrong by leaving a certified copy of the same with A. B. Bates the attorney of R. Armstrong and on Pai by leaving a certified copy at her usual place of abode with a member of her family, Pai being absent on Island of Hawaii (Record, p. 265).

This is making constructive service by constructive service.

The record does not show that either the minors or guardian were ever in the courtroom during any part of the case. The guardian filed no appearance or answer in the name of his wards. His lawyer, the person served, signed and filed the answer and did it in the name of the guardian (Record, p. 269).

An appearance of a minor by attorney will not confer jurisdiction.

Evans v. Davies, 39 Ark., 235;
Brown v. Downing, 137 Penn. St., 569, 573;
Nicholson v. Wilborn, 13 Ga., 467, 472;
Somers v. Rogers, 26 Vt., 585, 587.

Under the service made the court had no jurisdiction over the infants.

Insurance Co. v. Bangs, 103 U. S., 435, 439;
Thompson v. McDermott, 19 Fla., 852;
Dickison v. Dickison, 124 Ill., 483, 487;
Campbell v. Laclede Gas Co., 84 Mo., 352, 367;

- Campbell v. Campbell, 63 Ill., 462;
 McDermaid v. Russell, 41 Ill., 490;
 Hickenbotham v. Blackledge, 54 Ill., 318;
 Jones v. Mason, 4 N. C., 561;
 K. C. St. & C. B. Rr. Co. v. Campbell, Nelson & Co.,
 62 Mo., 585, 588;
 Hendricks v. McLean, 18 Mo., 32, 37;
 Hawkins v. Hawkins Adm., 28 Ind., 66, 72;
 Wheeler v. Ahrenbeck, 54 Tex., 535, 537;
 Kremer v. Haynie, 67 Tex., 450;
 Brock v. Doyle, 18 Fla., 172;
 Allsmith v. Freutchenicht, 86 Ky., 198, 204;
 Dodge v. Foulks, 11 B. Mon., 178, 179;
 Graham v. Sublett, 6 J. J. Marsh, 45.

Some authorities draw a distinction between suits *in personam* and *in rem* and under the statutes allowing a decree of a court in chancery to order a conveyance by commissioner or to convey property by the decree itself, would treat a suit of this kind as one *in rem* or *quasi in rem*.

But there was no such statute in Hawaii and the court in 1858 did not act *in rem* but *in personam*. The decree is personal and does not declare a trust. No publication of service was ordered. No chancery guardian or guardian *ad litem* was appointed. The suit was certainly not for the benefit of the minors, and in contemplation of equity from the standpoint of plaintiff, the minors owned no property.

Some decisions hold a decree without service on a minor to be voidable, not void, and thus good against collateral attack, and this is the ground of the decisions of Judges Perry and Frear in *Kapiolani v. Atcherley*. These decisions do not lay down the rule of local practice that a decree may be made against a minor without service on him.

Judge Perry looks at the bill, answer and remainder of

the record to understand the decree (Record, p. 317), but in doing this shuts his eyes to the errors there. This is inconsistent.

As there was no final decree in Kapiolani Estate v. Atcherley and the two opinions of Perry and Frear ignore all equities of appellee and the fact that appellant has the burden of the initiative these decisions should not be taken as establishing a rule of local practice.

Respectfully submitted,

LYLE A. DICKEY,

E. M. WATSON,

Attorneys for Appellee.

222 U. S.

Argument for Appellant.

LEWERS AND COOKE, LIMITED, v. ATCHERLY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF
HAWAII.

No. 69. Argued December 4, 1911.—Decided December 18, 1911.

Where one asks the aid of a court of chancery in executing a former decree, he takes the risk of opening such decree for reëxamination.

Lawrence Manufacturing Co. v. Janesville Cotton Mills, 138 U. S. 532.

Of two former decrees adjudicating title to real estate, the Supreme Court of Hawaii having found that the earlier was right and bound all interests and that the later was wrong, this court affirms, seeing no reason for not following the local court.

Great weight should be attributed to the decision of the court on the spot, especially when ancient law is involved, such as existed in Hawaii before the annexation.

This court sustains the rule laid down by the Supreme Court of Hawaii that decisions of the Board of Land Commissioners of 1845 could not be attacked except by direct appeal to the Supreme Court of Hawaii as provided by law.

A decree establishing a will may determine who is entitled to testator's property without determining that a particular property belonged to the inheritance.

Where a case has not passed to a final decree one buying *pendente lite* from a party thereto stands no better than the vendor. *Mellen v. Moline Iron Works*, 131 U. S. 352.

18 Hawaii, 625; 19 Hawaii, 47, affirmed.

THE facts are stated in the opinion.

Mr. David L. Withington, with whom Mr. William R. Castle, Mr. W. A. Greenwell and Mr. Alfred L. Castle were on the brief, for appellant:

It was error to overrule the discretion of the Court of Land Registration in declining to reopen the decree of 1858.

The court then had jurisdiction, the case was decided on the merits, and, whether the decree was right or wrong, the decision is now *stare decisis*, and property rights have been built up on the faith of that decree. *Darling v. Westmoreland*, 52 N. H. 401. See also as to other matters in

discretion of the court, *Central Trust Co. v. Locomotive Works*, 135 U. S. 207; *Davis v. Braden*, 10 Pet. 286; *Early v. Rogers*, 16 How. 599; *Slicer v. Bank of Pittsburg*, 16 How. 571; *McAllister v. Kuhn*, 96 U. S. 87; *United States v. Estudillo*, 1 Wall. 710; *Rio Grande Irrigation and Colonization Co. v. Gildersleeve*, 174 U. S. 602.

No abuse of discretion on the part of the Land Court has been shown. Appellants have a legal title to the land, since it will be presumed that a deed has been executed, as adverse possession was found by the Land Registration Court, *Kaai v. Mahuka*, 5 Hawaii, 354; *Fauntleroy's Heirs v. Henderson*, 51 Kentucky, 447.

The equitable title is in appellant. Before the Mahele, land tenures were in one sense feudal, but by the Great Mahele the King surrendered the allodial ownership of the land, reserving certain portions to the crown, certain portions to the King personally, and certain portions for the public use. Commissioners were appointed, upon whom were conferred all private and public powers over property belonging to the King, who were only authorized to ascertain the claimant's kind and amount of title and to award for or against that title. *Thurston v. Bishop*, 7 Hawaii, 421; Art. IV, c. IV, Kamehameha III, 107.

At the time of making this award, April 10, 1849, the guardian had the absolute control and management of the ward's property, with the power to dispose of the same without the necessity of any order of court, and his failure to present a claim to the Commissioners was binding on the infant. *Kamehameha v. Kahookano*, 2 Hawaii, 118; *Laanui v. Puohu*, 2 Hawaii, 161.

Even had the guardian done his duty, the proceedings would have been the same, excepting that the award and the patent would have been issued to the guardian for the ward. *Kalakaua v. Keaweamahi*, 4 Hawaii, 577; *Lono v. Phillips*, 5 Hawaii, 357, 359; *Kaaihue v. Crabbe*, 3 Hawaii, 768; *Jones v. Meek*, 2 Hawaii, 9.

222 U. S.

Argument for Appellant.

The Hawaiian court had jurisdiction in an action to reach property in a suit in equity. *Montgomery v. Coady*, 2 Hawaii, 322; *Davis v. Brewer*, 3 Hawaii, 270, and 3 Hawaii, 359; *Wei See v. Young Sheong*, 3 Hawaii, 489.

Equity will relieve against every species of fraud and so may set aside or annul decrees or judgments obtained through fraud. *Akeau v. Iakona*, 13 Hawaii, 216; *Norris v. Herblay*, 9 Hawaii, 514; *Mills v. Briggs*, 4 Hawaii, 506; and see *Hop v. Parke*, 6 Hawaii, 688; *Hackfield v. Bal*, 6 Hawaii, 364. See also *Perry v. Lucas*, 11 Hawaii, 350; *Kapea v. Moehonua*, 6 Hawaii, 49.

The minors having been represented at the probate of the will by their guardian *ad litem*, and having contested the probate, are bound by that judgment. *Keliipalapela v. Pamano*, 1 Hawaii, 503, 505.

Judge Allen was bound by the decision of Judge Robertson in probate, who held that Kalakaua was the equitable owner of the property and that Kinimaka was his guardian under the will of Kaniau.

The Hawaiian cases cited by the court are not in conflict with the holding of Chief Justice Allen and *Kukuahu v. Gill*, 1 Hawaii, 90.

The decisions of this court sustain Chief Justice Allen's jurisdiction.

Where one party has acquired the legal title to property to which another has the better right, a court of equity will convert him into a trustee of the true owner, and compel him to convey the legal title. *Johnson v. Towsley*, 13 Wall. 85; *Stark v. Starr*, 6 Wall. 419; *Bagnell v. Broderick*, 13 Pet. 436; *Patterson v. Winn*, 11 Wheat. 380; so where one an agent of another procures the patent to be issued to himself; *Ringo v. Binns*, 10 Pet. 269; and for cases where property has been adjudged to be held by the legal owner as trustee *ex maleficio* see, *Angle v. Chicago R. R. Co.*, 151 U. S. 1, 26; *Moore v. Crawford*, 130 U. S. 122; *White v. Cannon*, 6 Wall. 443; *Massie v. Watts*, 6

Cranch, 148; *Meador v. Norton*, 11 Wall. 442; *Felix v. Patrick*, 145 U. S. 317, 328; *Bernier v. Bernier*, 147 U. S. 242; *Bockfinger v. Foster*, 190 U. S. 116; *Johnson v. Waters*, 111 U. S. 640; *Widdicombe v. Childers*, 124 U. S. 400; *Sanford v. Sanford*, 139 U. S. 642. See also cases in regard to Californian and Mexican titles holding that the act in regard to private land claims includes perfect as well as inchoate or equitable titles, and that the only remedy is by appeal. *Botiller v. Dominguez*, 130 U. S. 238; *Ainsa v. New Mexico & Ariz. R. Co.*, 175 U. S. 76.

The act provides for a confirmation rather than a quitclaim. *Boquillas Land & Cattle Co. v. Curtis*, 213 U. S. 339; *Los Angeles F. & M. Co. v. Los Angeles*, 217 U. S. 226.

Trust relations respecting the property between the patentee and others may be enforced equally with such relations between him and others respecting any other property. *More v. Steinbach*, 127 U. S. 70.

There is nothing in the Hawaiian act which would justify any distinction between the principles laid down in these decisions and the principles to be applied to the case of 1858.

As there is neither Hawaiian statute nor judicial precedent in conflict, these cases are binding on the Hawaiian court.

The decree of Judge Roberston admitting the will of Kaniu to probate is a binding adjudication that Kalakaua was, after the death of Kaniu, beneficially entitled to the premises in question. *Keliipelapela v. Pamano*, 1 Hawaii, 503, 505.

The decree of November 2, 1858, is a conclusive adjudication between the parties, and is complete and final. *Kuala v. Kuapahi*, 15 Hawaii, 300; *McChesney v. Kona Sugar Co.*, 15 Hawaii, 710; *United States v. Morse*, 218 U. S. 493, 505; *Mellen v. Moline Malleable Iron Works*, 131 U. S. 352.

If the decree of 1858 was not adversary but by consent,

222 U. S.

Argument for Appellant.

yet as it is based on a valuable consideration, namely, the release of other lands, it cannot be upset to-day.

The decision in *Kapiolani Estate, Limited, v. Atcherly* is a binding and conclusive adjudication on the appellee.

If the decision of 1903 is not the law of the case, then the question should be regarded as foreclosed on the ground of *stare decisis*. *Vail v. Arizona*, 207 U. S. 201.

The decisions of Judge Robertson and Chief Justice Allen in 1858, and the decision of the Supreme Court in 1903 having laid down a rule of property, the appellant was entitled to rely upon it in making a purchase of the property, and the Hawaiian court cannot disregard its former opinion.

These decisions had become a rule of property, and the appellee relied on them in paying only \$50 for the Kinimaka title in 1897, before the decision of 1903; and the appellant relied on all the decisions, including that of 1903, as declaring a rule of property, in paying \$35,000 for the Kalakaua title. *Kuhn v. Fairmont Coal Co.*, 215 U. S. 372.

A single decision of the Hawaiian Supreme Court has been held to establish a rule of property. *Kealoha v. Castle*, 210 U. S. 148. It is not only a rule of property, but is a rule of this particular property, which the purchaser had a right to rely on, and which is binding on every court until reversed. *Grignon v. Astor*, 2 How. 343; *The Propeller Genesee Chief v. Fitzhugh*, 12 How. 451, 458; *Henderson v. Griffith*, 5 Pet. 151; *Minn. Min. Co. v. Nat. Min. Co.*, 3 Wall. 332; *Bibb v. Bibb*, 79 Alabama, 437; *Hihn v. Curtis*, 31 California, 398; *Schori v. Stephens*, 62 Indiana, 441; *Frank v. Evansville & I. R. Co.*, 111 Indiana, 132; *Dunklin County v. Chouteau*, 120 Missouri, 577; *White v. Kyle*, 1 Serg. & R. 15; *Bright v. Esterly*, 199 Pa. St. 88; *Henderson v. Rost*, 11 La. Ann. 541; *Wilkins v. Chicago, St. L. & N. O. Ry. Co.*, 110 Tennessee, 442; *Union Ry. Co.*

v. *Chickasaw Cooperage Co.*, 116 Tennessee, 598; *O'Rourke v. Clopper*, 22 Tex. Civ. App. 377.

The decisions of 1858 and 1903 necessarily construed the statutes defining the jurisdiction of the Land Court and of the Supreme Court in 1858 and held that that court had jurisdiction. These decisions became a part of the law, and a subsequent decision could not change the rights of the parties. *Houston & T. C. R. Co. v. Texas*, 177 U. S. 66; *State v. Comptoir Nat. D'Escompte De Paris*, 51 La. Ann. 1272; 1 Kent's Com. 476; *Suth. Stat. Constr.*, § 319; *Rowan v. Reynolds*, 5 How. 134; *Ohio L. Ins. & T. Co. v. Debolt*, 16 How. 416; *Los Angeles v. Los Angeles City Water Co.*, 177 U. S. 558; *Muhlker v. N. Y. & H. R. R. Co.*, 197 U. S. 544.

The rule is the same in regard to a conveyance as to any other contract. Its validity and effect is determined by the laws then in force. *Stephenson v. Boody*, 139 Indiana, 66; *Haskett v. Maxey*, 134 Indiana, 182; *Levy v. Hitsche*, 40 La. Ann. 508; *Fisher v. Lott*, 110 S. W. Rep. 822; *Myers v. Boyd*, 144 Indiana, 449.

Nor is it material in this case that the change is by judicial decision and not by statute. *Loeb v. Trustees of Township*, 179 U. S. 472.

The rule applies where the question involved is the jurisdiction of a court with reference to land. *Herndon v. Moore*, 18 S. Car. 355; *Hall v. Wells*, 54 Mississippi, 301.

Mr. Lyle A. Dickey, with whom *Mr. E. M. Watson*, was on the brief for appellee:

No presumption arises from lapse of time and occupation that in 1858 Richard Armstrong executed a deed of this land to Lalakaua. *Ricard v. Williams*, 7 Wheat. 221, 227; *Fletcher v. Fuller*, 120 U. S. 534, 550, 592.

The Supreme Court was not bound to follow its own prior decision in *Kapiolani Estate, Limited, v. Aicherly*

222 U. S.

Argument for Appellee.

as *stare decisis*. *Hertz v. Woodman*, 218 U. S. 205, 212. The rule of law of the case did not deprive the Supreme Court of Hawaii of power to decide that the decree of 1858 was erroneous. A ruling on a demurrer is not such a final adjudication that the court may not reconsider its action and enter a contrary order nor decide the same matter differently when subsequently presented again in the same case. 31 Cyc. 350; *Hamilton v. Marks*, 63 Missouri, 167, 172; *Jungk v. Reed*, 12 Utah, 292; *Reeves v. Petty*, 44 Texas, 249, 254; *Meyers v. Dittmar*, 47 Texas, 373; *Norton v. Knapp*, 64 Iowa, 112, 115; *Hastings v. Foxworthy*, 45 Nebraska, 676, 697; *Penn. Co. v. Platt*, 47 Oh. St. 366, 379; *Great Western Telegraph Co. v. Burnham*, 162 U. S. 339.

The stipulation entered into between Kapiolani Estate, Limited, and appellee in the equity suit, to withdraw the original pleadings and substitute others and reciting that both parties wished to have the question of *res adjudicata* settled before proceeding farther, does not bind the parties here in any way, much less the court.

Appellant as a purchaser from Kapiolani Estate, Limited, bought *pendente lite* with notice of the pending litigation and the claims of appellee and so has no right to rely on any rule of law, there being no final decree. *Mellen v. Moline Iron Works*, 131 U. S. 352, 370; *Gay v. Parpart*, 106 U. S. 679, 696.

The principle of *stare decisis* does not apply to the decree of 1858 for there is no decision. The decree of 1858 lays down no rule of property.

Practice in the courts of a Territory is based upon local statutes and procedure and the Supreme Court of the United States is not disposed to review the decision of the territorial supreme court in such cases. *Sante Fe County v. Coler*, 215 U. S. 296, 307; *Sweeny v. Lomme*, 22 Wall. 208, 213; *Mining Co. v. Arizona Board*, 206 U. S. 474, 479; *Fox v. Haarstick*, 156 U. S. 674, 679; *Maytin v.*

Vela, 216 U. S. 598, 602; *Armijo v. Armijo*, 181 U. S. 558, 561; *English v. Arizona*, 214 U. S. 359, 363.

The original tenure of Hawaii from the time Kamehameha first established the monarchy to 1839 was feudal and a despotism. The King and each overlord under him had absolute ownership and control of the land and people under him. Rev. Laws of Hawaii, pp. 1164-66, 1179, Laws of 1842, of Hawaii, Ch. LIV.

The awards of the Board of Commissioners to quiet land titles gave fee simple titles for the first time; did away with feudal tenure and settled forever all claims to lands arising prior to December 10, 1845. See act to organize the Executive Departments of the Hawaiian Islands. Part I, Ch. VII, Art. IV.

In the case of 1858 no fraud, actual or constructive, was pleaded or proved. General allegations of fraud are insufficient. *Greenameyer v. Coats*, 212 U. S. 434, 444; *United States v. Arredondo*, 6 Pet. 691, 716.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an appeal from a decree refusing to the appellant the registration and confirmation of its title to a parcel of land, described as lot 1 of Land Commission Award 129, Royal Patent 1602. 18 Hawaii, 625. 19 Hawaii, 47. The appellant claims through mesne conveyances from David Kalakaua. Kalakaua was adopted by one Kaniu as her child. She had certain rights, not fully defined, in the land, and left all her property to Kalakaua by an oral will in 1844. Her husband, Kinimaka, seems to have reported this to the King, as required in those days, and there is evidence that the King disapproved it on account of Kalakaua's youth. The fact is not found or admitted, however, and the judge who established the will denied the power of the King. In 1849 the Land Commission adjudged the land to Kinimaki in fee simple. In 1856, on or

222 U. S.

Opinion of the Court.

shortly before his coming of age, Kalakaua filed a bill in equity in the court of land registration of Oahu, according to the finding of the Supreme Court, to establish a trust against Kinimaka, but this suit was not carried to final decree. In 1858 he proved the will of Kaniu, 2 Hawaii, 82, and thereafter in the same year brought another bill against the widow and guardian of the minor children of Kinimaka, who had died, which ended in a decree that the guardian convey the premises to Kalakaua. This was in 1858. There was no conveyance in accordance with the decree, but Kalakaua occupied the land before and after he became King, conveyed it to his wife, Kapiolani, in 1868, and after his death she occupied it until her death in 1898.

The respondent claims by virtue of a remainder limited in the will of Kinimaka. In 1901 she brought an action of ejectment, whereupon the Kapiolani Estate, Limited, brought a suit in equity to restrain her, on the ground of the foregoing facts. There was a demurrer, which was overruled, 14 Hawaii, 651, and in that stage of the case the appellant bought from the Kapiolani Estate. The cause is still pending, the parties having agreed to try their rights in the present suit.

When the demurrer to the bill of the Kapiolani Estate was overruled the subject mainly discussed was whether the decree of 1858 against the guardian of Kinimaka's children bound the children, they not having been made parties to the bill, as it was admitted that they should have been. But the decision now appealed from, while hinting at a possible difference upon that point, in view of 'the many indications that the decree of 1858 was substantially a consent decree,' placed itself upon a different ground. It held (18 Hawaii, 632) that the appellant, "in seeking to register a title depending upon the unexecuted decree in *Kalakaua v. Pai and Armstrong* is, as against the holder of the outstanding legal title, in the same position as a party asking the aid of a court of chan-

cery in executing a former decree, and it is well established that he must take the risk of opening up such decree for reëxamination. *Lawrence Mfg Co. v. Janesville Mills*, 138 U. S. 552." Acting on this rule, as to the application of which in practice we see no sufficient reason for not following the local court, the Supreme Court came to the conclusion that the adjudication of the Land Commission in 1849 bound all interests, and that the decree of 1858 was wrong.

On this point also there is every reason for attributing great weight to the decision of the court on the spot. It concerns the powers of another earlier local tribunal and involves obscure local history concerning a time when the forms of our law were just beginning to superimpose themselves upon the customs of the islanders. Such customs are likely to be distorted when translated into English legal speech. Thus Kaniu is spoken of as the owner of the land; yet a few years before the King would have done with it as he liked, and that the tradition and fact had not wholly disappeared after his grant of the Constitution of 1839 is indicated by his alleged conduct touching the will. The precariousness of titles is emphasized by the laws of 1842. So it is said that Kinimaka was the natural guardian of Kalakaua, we presume on the evidence that Kaniu assented to a suggestion that she had better leave her property in Kinimaka's hands till Kalakaua came of age. But it would be going rather far to apply the refined rules of the English Chancery concerning fiduciary duties to the relations between two Sandwich islanders in 1846, on the strength of such a fact. The real foundation of settled titles seems to have been the establishment of the Land Commission in 1845. *Thurston v. Bishop*, 7 Hawaii, 421, 428. When the Supreme Court of Hawaii repeats what it has been saying for many years that the decisions of that Board could not be attacked except by a direct appeal to the Supreme Court provided by law, no imperfect analogy

222 U. S.

Syllabus.

such as that of patents issued by our Land Department is sufficient to overthrow the tradition, fortified as it is by logic and good sense.

Of course, the later decree establishing the will does not affect the case. That determined only that Kaniu left all her property to Kalakaua, but not that any particular property belonged to the inheritance. The decree overruling the demurrer of the defendant to the bill of the Kapiolani Estate also is relied upon. But as that case has not passed to a final decree, and the appellant bought the land in controversy *pendente lite*, it can stand no better than its vendor the party to the suit. *Mellen v. Moline Iron Works*, 131 U. S. 352, 370. If that case instead of this had been prosecuted to final decree there was nothing in its former action to hinder the Supreme Court from adopting the principle now laid down, even though it thereby should overrule an interlocutory decision previously reached. *King v. West Virginia*, 216 U. S. 92, 100, 101. Other details were mentioned in argument, but nothing more seems to us to need remark.

Decree affirmed.